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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 888

GULF OIL CORPORATION and GULF REFINING COMPANY,

Petitioners

v.

FEDERAL POWER COMMISSION, ET AL,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Gulf Oil Corporation and Gulf Refining Company pray that a writ of certiorari issue to review the judgment entered in this case by the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals, which appears herein as Appendix F, has not been reported. The opinion of the District Court, which appears herein as Appendix D, is reported at 128 F. Supp. 446.

JURISDICTION

The judgment of the Court of Appeals was rendered and entered on January 30, 1956. The Court of Appeals denied petition for rehearing on March 21, 1956. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

1. Is Federal Power Commission Order No. 174-B subject to judicial review in a suit in equity and for declaratory judgment by a gas producer making some sales undisputedly subject to the Natural Gas Act and other sales coming within the terms of such order before a formal administrative determination by the Commission that such producer is subject to the order?

2. Does the absence of a formal administrative determination that a gas producer is subject to Federal Power Commission Order No. 174-B prevent judicial review of that order in a suit in equity and for declaratory judgment by a producer admittedly making some sales held to be subject to the Natural Gas Act in *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672, where the complaint contains allegations that the order exceeds the Commission's authority and violates the Administrative Procedure Act and where the undenied facts show irreparable injury and the threat of oppressive penalties?

3. Is a gas producer who admittedly makes some sales subject to the Natural Gas Act entitled to a temporary injunction in a suit in equity and for declaratory judgment attacking the validity of Federal Power

Commission Order No. 174-B where the undenied facts show disruption of such producer's business, loss of revenues, and threat of oppressive penalties?

4. Did the Court of Appeals err in directing the trial court to dismiss petitioners' complaint on the ground that petitioners have not exhausted their administrative remedies?

5. Did the Court of Appeals err in affirming the order of the District Court denying petitioners' motion for temporary injunction?

STATUTES AND REGULATIONS INVOLVED

The relevant parts of the Natural Gas Act of 1938 (52 Stat. 821-833, 15 U.S.C. 717-717w), as amended February 7, 1942 (56 Stat. 83-84, 15 U.S.C. 717f), and July 25, 1947 (61 Stat. 459, 15 U.S.C. 717f(h)), are set out in Appendix A. The relevant parts of the Administrative Procedure Act (60 Stat. 237-244, 5 U.S.C. 1001-1011) are set out in Appendix B. Federal Power Commission Order No. 174-B is set out in Appendix C.

STATEMENT OF THE CASE

On July 16, 1954, the Federal Power Commission, purporting to act under the authority of the Natural Gas Act as construed in *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672, issued Order No. 174 (19 F.R. 4534) in its Docket No. R-138. This order was issued without any prior notice or hearing. On August 6, 1954, the Commission, also without prior notice or

hearing, issued Order No. 174-A (19 F.R. 5081), which rescinded and superseded Order No. 174.

Orders Nos. 174 and 174-A were described as "regulations governing the filing of rate schedules and applications for certificates of public convenience and necessity by persons engaged in the production and gathering of natural gas and held by the Supreme Court to be subject to all the requirements of the Natural Gas Act in *Phillips Petroleum Co. v. Wisconsin, et al*, 347 U.S. 672." Both of these orders purported to regulate "independent producers," defined therein as "any person as defined in the Natural Gas Act who is engaged in the production or gathering of natural gas and who transports natural gas in interstate commerce or sells natural gas in interstate commerce for resale, but who is not primarily engaged in the operation of an interstate pipeline."

On August 16, 1954, petitioners filed an application for rehearing with the Commission containing various objections to the manner in which Order No. 174-A was issued and to certain provisions of that order alleged to be beyond the authority of the Commission under the Natural Gas Act.

On September 8, 1954, an order was issued by the Commission granting oral argument on the application for rehearing of petitioners and others and setting such argument for September 22, 1954. In this order the Commission also denied all requests for stay of Order No. 174-A. Petitioners filed a brief and participated in the oral arguments before the Commission held on September 22 and 23, 1954.

On September 24, 1954, the Commission issued an order making a minor change in Order No. 174-A and extending the deadline for the filing of applications for certificates and rate schedules by independent producers from October 1, 1954, to December 1, 1954.

Petitioners, who are engaged in the business of producing oil and gas in numerous states, have extensive and valuable oil and gas properties and have entered into valuable contracts for the sale and disposition of the oil and gas produced from these properties (J.A. 22-30).[1] The sales of gas by petitioners where some or all of such gas ultimately goes across a state line fall into the following three categories (J.A. 7-8, 22-27):

(a) Sales of residue gas made at the tail gate or outlet pipe of gasoline plants owned in whole or in part by petitioners.

(b) Sales of gas well gas or of casinghead gas (gas associated with oil and produced from oil wells) which is not to be processed. Such sales are made at the wellhead or at the downstream side of a separator, located adjacent to or near the wellhead, or prior to the completion of gathering.

(c) Sales of gas well gas or of casinghead gas which is to be processed. Such sales are made at the wellhead or at the downstream side of a separator located adjacent to or near the wellhead or prior to processing. These sales are made under contracts which provide for the processing of the gas by the purchaser, which in some instances is

[1] The Joint Appendix, printed for the use of the court below, has been filed as a part of the transcript of the record in this case and is referred to herein as "J.A."

an interstate pipeline company and in other instances is one who subsequently sells residue gas to an interstate pipeline company. These sales may be broken down further into two categories:

(i) Those in which petitioners receive a specified price per thousand cubic feet for the residue or raw gas; and

(ii) Those in which petitioners receive a certain percentage of the proceeds received by the plant owner upon sale of the residue gas remaining after processing.

Each of petitioners' contracts covering sales of this type provides for the passing of title to the purchaser at the point of delivery, and petitioners thereafter have no control over the disposition of the residue gas sold or used by the purchaser.[2]

On November 30 and December 1, 1954, petitioners filed applications for certificates and rate schedules covering their sales of gas described in categories (a) and (b) above, expressly reserving their rights to question the jurisdiction of the Commission over petitioners and to challenge the validity of Order No. 174-A in subsequent court proceedings. However, petitioners did not file applications for certificates or rate schedules covering their sales described in category (c) above, it being petitioners' position that these sales were not covered by Order No. 174-A and were not

[2] Diagrams showing the various stages through which the gas moves in each of these categories and the point at which sale and delivery are made by petitioners appear on pages 34 A, B, and C of the Joint Appendix.

subject to the Commission's jurisdiction under the Natural Gas Act.

On December 17, 1954, the Commission issued Order No. 174-B (19 F.R. 8807), which appears herein as Appendix C. In this order the Commission denied all applications for rehearing except for certain immaterial changes made by Order No. 174-B. This order contained a further provision in Section 154.91(b) not found in Order No. 174-A the effect of which is to require producers who sell to a processing plant to file applications for certificates and rate schedules covering such sales, in the absence of a filing by the plant operator, where "the payments by such operator to the producers represent a percentage of the proceeds of the sale thereof by the operator." (Appendix, pp. 22-23)

After the issuance of Order No. 174-B, petitioners filed the complaint in this suit (J.A. 1-21), invoking the jurisdiction of the District Court under the provisions of 28 U.S.C. 2201, 28 U.S.C. 2202, 5 U.S.C. 1009, 15 U.S.C. 717u, and 28 U.S.C. 1331. Petitioners sought a temporary injunction against the enforcement of Order No. 174-B and the Natural Gas Act with respect to their wellhead sales and sales for processing, described above in categories (b) and (c) respectively (J.A. 32-33).

The complaint (J.A. 1-21) alleged that the Commission, in the promulgation and application of Order No. 174-B, had exceeded its authority under the Natural Gas Act and had violated the Administrative Procedure Act in the following respects:

(1) By asserting jurisdiction over wellhead sales by the definition of "independent producer" contained in Order No. 174-B and by applying that order to wellhead sales in issuing certificates, accepting the filing of rate schedules, and suspending and granting changes in rates.

(2) By the provisions of Section 154.94(c) of Order No. 174-B prohibiting the operation of price adjustment clauses in petitioners' gas sales contracts and denying petitioners the right to receive the rates to which they were entitled under such contracts without prior approval by the Commission.

(3) By issuing Order No. 174-B without notice or hearing as required by the Natural Gas Act and the Administrative Procedure Act.

(4) By fixing petitioners' rates without a hearing pursuant to either Section 4(e) or Section 5(a) of the Natural Gas Act, resulting in a deprivation of petitioners' property without due process of law, in violation of the Fifth Amendment to the Constitution of the United States.

(5) By compelling petitioners against their will to apply for certificates of public convenience and necessity in violation of the Natural Gas Act.

(6) By extending the coverage of the Natural Gas Act to activities of producers and gatherers expressly exempted under the terms of that Act.

(7) By fixing the rates and prices which petitioners may initially charge, contrary to the provisions of Section 4(c) of the Natural Gas Act.

(8) By reducing petitioners' rates without complying with the requisite proceeding provided in Section 5(a) of the Natural Gas Act.

(9) By treating the operation of price adjustment clauses in petitioners' existing contracts as a change in rate and thus subject to suspension under Section 4(e) of the Natural Gas Act.

(10) By fixing petitioners' rates retroactively to June 7, 1954.

(11) By extending the application of Section 7(b) of the Natural Gas Act, pertaining to abandonment of services, to the producing facilities and operations of petitioners.

The facts alleged in the verified complaint (J.A. 15-18) and set forth in the supporting affidavit of Mr. R. C. Frederick (J.A. 27-31) show that petitioners are being and will be irreparably injured by respondents' application and enforcement of Order No. 174-B and the Natural Gas Act by being subjected to or threatened with onerous daily penalties and criminal liability under Section 21 of the Natural Gas Act (15 U.S.C. 717t) with respect to sales of gas for which petitioners have made no filings with the Commission and have not obtained a certificate of public convenience and necessity and about which petitioners and respondents are in dispute as to the respondents' jurisdiction; by having their prices in existing contracts of sale frozen by Order No. 174-B as of June 7, 1954, and being prevented by such order from collecting price increases and tax reimbursements provided in such contracts without prior approval by the

Commission; by being unable to make new sales of gas to interstate pipeline companies without submitting such sales to the unlawful control of respondents or run the risk of severe penalties by making such sales without the coverage of a certificate of public convenience and necessity; by being delayed in or prevented from withdrawing gas from the interstate market for repressuring, pressure maintenance, or other operations designed to obtain the maximum ultimate recovery of oil from the reservoir; and by being subjected to conflicting regulations by the Commission and the respective state conservation authorities and subject to severe daily penalties if they violate the regulations or orders of either agency.

Respondents filed no answer or counteraffidavits in the District Court.

The District Court in a ruling from the bench, which appears herein as Appendix D, denied petitioners' motion for temporary injunction, and an order to that effect was entered March 14, 1955, which appears herein as Appendix E. The order contains the following pertinent findings:

"11. The administrative remedies of the Plaintiffs have not been exhausted.

"12. Plaintiffs have not shown that there is irreparable damage at the present time."

On January 30, 1956, the Court of Appeals for the District of Columbia Circuit, with one judge dissenting, affirmed the order of the trial court with respect to the denial of the temporary injunction and remand-

ed the case with directions to dismiss the complaint (Appendix, p. 62). In support of this action, the Court of Appeals referred to its decision of the same date in *Federal Power Commission v. Union Producing Co.*, Nos. 12,583-84, which appears herein as Appendix G. The petition for rehearing was denied by that court March 21, 1956.

REASONS FOR GRANTING THE WRIT

I. The decision of the Court of Appeals directing the dismissal of the complaint is in conflict with decisions of this Court concerning judicial review of administrative orders.

The opinion of the Court of Appeals consisted of the following statement:

> "Due to the similarity of facts and identity of the legal principles involved in the instant case with those in Nos. 12583-84, Federal Power Commission v. Union Producing Company, decided this day, we affirm the order of the trial court with respect to the denial of the injunction and remand the case with directions to dismiss the complaint." (Appendix, p. 62)

The basis of the Court of Appeals' decision in *Federal Power Commission v. Union Producing Company* is found in the following excerpt from that opinion:

> "The company relies on *Columbia Broadcasting System v. United States*, 316 U.S. 407. However, this case did not involve the question of CBS' status. That was already clear. The relief asked by CBS was not the securing of a determination as

to whether or not certain transactions (and CBS as a participant) were within the terms of the Federal Communications Commission regulations. CBS wanted a court ruling that the regulations in their entirety were outside the agency's statutory authority. The Supreme Court determined (1) that it was considering an 'order' in that the rules and regulations in question impaired existing contracts and obligations, and (2) that these rules and regulations operated to control in advance the rights not only of licensees but also of others, the broadcasting networks. The only action remaining in the CBS case was the enforcement by the Commission of the regulations against a station licensee.

"In the instant case, however, it seems to us that the real request of the company is to have particular transactions classified as outside the Act and the regulations. This cannot be done until the agency has passed on the question. *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938). Where means are provided for obtaining administrative determination as to whether the plaintiff companies are subject to rules and regulations of the Commission, those means must be resorted to prior to judicial review. Certainly, we cannot assume that an exercise of those means would be a useless task, for that assumption would necessarily be pitched on a presumption that the Commission is derelict in its duties under the Constitution and the Natural Gas Act." (Appendix, pp. 69-70)

Insofar as the positions of petitioners and Union may be similar, the Court of Appeals erred in failing to afford to petitioners and Union the temporary pro-

tection which they both seek and in directing the trial court to dismiss the complaints in both cases. The action of the court in these respects is in conflict with various decisions of this Court concerning judicial review of regulations and orders of administrative agencies, among which are *Columbia Broadcasting System v. United States*, 316 U.S. 407, and *Skinner & Eddy Corp. v. United States*, 249 U.S. 557.

As heretofore shown (*supra*, pp. 8-9), petitioners' complaint contains specific allegations stating the manner in which respondents exceeded their authority under the Natural Gas Act and violated provisions of the Administrative Procedure Act in the promulgation and application of Order No. 174-B. Among other things, the complaint shows that petitioners have contracts in which the price for gas sold on June 7, 1954, was less than the price in effect on the date Order No. 174-B and the preceding orders were issued. Also, many of these contracts which were in effect on June 7, 1954, provide for price adjustments which had not become operative on the date of the issuance of these orders. Section 154.92(a) of Order No. 174-B requires independent producers "who, on or since June 7, 1954," have made sales subject to the jurisdiction of the Commission to file rate schedules "setting forth the terms and conditions of service and all rates and charges for such transportation or sale effective on June 7, 1954." (Appendix, p. 23) Section 154.94(a) prohibits any change in the "rate, charge, or service in effect on and after June 7, 1954 . . . without first filing a change in rates pursuant to Section 4(d) of the Natural Gas Act and in accordance with this section." (Appendix, p. 25)

Section 154.94(c) provides that "The operation of any provision of the rate schedule providing for future or periodic changes in the rate, charge, classification, or service after June 7, 1954, or the operation of any like provision in any initial rate schedule filed after June 7, 1954, shall constitute a change in rate schedule." (Appendix, p. 26) Thus respondents, by these provisions of Order No. 174-B, have unlawfully fixed rates retroactively to June 7, 1954; have unlawfully fixed the rates and prices which petitioners may initially charge, contrary to the provisions of Section 4(c) of the Natural Gas Act (15 U.S.C. 717c) governing original filing; have unlawfully reduced petitioners' rates without complying with the requisite proceeding provided in Section 5(a) of the Act (15 U.S.C. 717d); and have unlawfully treated the operation of price adjustment clauses in petitioners' existing contracts as a change in rate and thus subject to suspension under Section 4(e) of the Act.

It is well settled that the Commission has no authority under the Natural Gas Act to fix rates retroactively. *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 618; *Hope Natural Gas Co. v. Federal Power Commission*, 196 F.2d 803, 805 (Ct. App. 4th); *cf. Public Utilities Commission of Ohio v. United Fuel Gas Co.*, 317 U.S. 456, 464.

That the Commission has no authority to fix the initial rates of natural gas companies is recognized in the recent opinion in *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*,—U.S.—, 100 L.Ed. 291, 296-298, in which this Court stated:

". . . the Natural Gas Act permits the rela-

tions between the parties to be established initially by contract . . . .

". . . .

". . . The initial rate-making and rate-changing powers of natural gas companies remain undefined and unaffected by the Act.

"All of the relevant provisions of the Act can thus be fully explained as simply defining and implementing the powers of the Commission to review rates set initially by natural gas companies, and there is nothing to indicate that they were intended to do more . . . The obvious implication is that, except as specifically limited by the Act, the rate-making powers of natural gas companies were to be no different from those they would possess in the absence of the Act. . . ."

Section 5(a) of the Natural Gas Act (Appendix, p. 4) expressly prohibits the Commission from fixing or changing rates except "after a hearing" and a finding by the Commission that the existing rate or charge or the contract affecting such rate or charge "is unjust, unreasonable, unduly discriminatory or preferential." As stated in *Colorado Interstate Gas Co. v. Federal Power Commission*, 209 F.2d 717, 724 (Ct. App. 10th), the Act "not only empowers but makes it the duty of the Commission, when necessary, to hold hearings to determine just and reasonable rates and fix the same by order."

Whether a hearing is required under the Administrative Procedure Act is determined by whether the action of the administrative agency is a "rule" or an "order" as those terms are defined in subsections (c) and (d) of Section 2 of that Act (5 U.S.C. 1001;

Appendix, p. 10). The distinction made in the Act between a "rule" and an "order" is patterned after the distinction made between legislative and judicial functions by Justice Holmes in *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 226, as follows:

> "... A judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation, on the other hand, looks to the future and changes existing conditions by making a new rule, to be applied thereafter to all or some part of those subject to its power ..."

"The key factor in Justice Holmes' analysis (and in the Act) is the element of time: A rule prescribes *future* patterns of conduct; a decision determines liabilities upon the basis of *present* or *past* facts."[3] Insofar as Order No. 174-B fixes rates retroactively to June 7, 1954, and prevents petitioners from receiving the price increases provided in their contracts which occurred after June 7, 1954, and prior to the issuance of Order No. 174-B and the preceding orders, the action of the Commission in promulgating Order No. 174-B is not only action which could be taken only "after a hearing" under Section 5(a) of the Natural Gas Act but is also an "order" and "adjudication" under Section 2 of the Administrative Procedure Act which could be issued only after notice and hearing as required by Section 5 of that Act (5 U.S.C. 1004; Appendix, pp. 10-11). In *Federal Power Commission v. Natural Gas Pipeline Co. of America*, 315 U.S. 575,

[3]Schwartz, "Administrative Terminology and the Administrative Procedure Act," 48 Mich. L. Rev. 57, 66-69.

583, this Court said: "The first prerequisite to an order by the Commission is that it shall be preceded by a hearing and findings." The right to a hearing having been denied, Order No. 174-B is "void." *Interstate Commerce Commission v. Louisville & Nashville R.R. Co.*, 227 U.S. 88, 91; *Morgan v. United States*, 298 U.S. 468, 477-478.

Section 154.93 of Order No. 174-B (Appendix, p. 25) defines the rate schedule required by Section 154.92 to be filed with the Commission as "the basic contract and all supplements or agreements amendatory thereof, effective and applicable on and after June 7, 1954 . . ." Thus petitioners' existing contracts in their entirety constitute the initial or original rate or schedule of charges which they chose to charge for their sales of gas. That petitioners had the right to establish their own initial rates was recognized in *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 100 L.Ed. 291. These contracts being petitioners' initial rates, the price adjustment clauses therein are not changes in rates but are a part of the petitioners' initial rate schedules and therefore cannot be suspended. *United Gas Pipe Line Co. v. Mobile Gas Service Corp., supra.* The Commission itself has promulgated a regulation concluding that "an initial rate schedule cannot be suspended." (12 C.F.R., §§ 2.4, 2.52)

The above and other allegations contained in petitioners' complaint to the effect that the Commission has exceeded its statutory powers, some of which are similar to the allegations contained in the *Union* complaint, authorized judicial review of Order No. 174-B even if it could be said that petitioners have not ex-

hausted their administrative remedies. Where the contention is made that an administrative agency "has exceeded its statutory power; and that, hence, the order is void . . . the courts have jurisdiction of suits to enjoin the enforcement of an order, even if the plaintiff has not attempted to secure redress in a proceeding before the" administrative agency. *Skinner & Eddy Corp. v. United States*, 249 U.S. 557, 563-564.

In *Eccles v. Peoples Bank*, 333 U.S. 426, 434, this court recognized that:

> "A determination of administrative authority may of course be made at the behest of one so immediately and truly injured by a regulation claimed to be invalid, that his need is sufficiently compelling to justify judicial intervention *even before the completion of the administrative process.*" (Emphasis added)

The verified complaint and supporting affidavit set forth various facts, which are summarized on pages 9-10, *supra*, showing the manner in which petitioners are being and will be injured by Order No. 174-B and the action of respondents thereunder. Since respondents did not file an answer or any counteraffidavits, these facts are not denied and must be accepted as true. As stated in *Columbia Broadcasting System v. United States*, 316 U.S. 407, 414:

> "Accepting the allegations of the complaint as true, as for present purposes we must, it is evident that application by the Commission of its regulations in accordance with their terms would disrupt appellant's broadcasting system and seriously disorganize its business."

These circumstances clearly make applicable the above statement in the *Eccles* case and *Columbia Broadcasting System v. United States*, 316 U.S. 407, where this Court permitted review of regulations of the Federal Communications Commission, and authorize judicial review of Order No. 174-B and the injunctive relief sought by petitioners and Union. There is no material difference between the character of the regulations involved in the *Columbia Broadcasting System* case and the regulations contained in Order No. 174-B, and the impact and adverse effect of this order upon petitioners is as great if not greater than that suffered by CBS from those regulations.

Under these circumstances, this suit for injunction and declaratory judgment is also authorized by Section 10 of the Administrative Procedure Act (5 U.S.C. 1009; Appendix, pp. 12-14).

Assuming *arguendo* that the Court of Appeals properly directed the trial court to dismiss Union's complaint for the reason that Union had not been determined to be subject to the order sought to be reviewed, there are material differences between the position of petitioners and that of Union which clearly make such action improper in this case. Petitioners make sales of residue gas from the tail gate or outlet pipe of gasoline plants owned in whole or in part by them, described in category (a) above (p. 5), which sales were held in *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672, to be subject to the Natural Gas Act. The Commission's jurisdiction over these sales is undisputed, and petitioners have filed applications for certificates and rate schedules covering them. There-

fore, insofar as these sales are concerned, Order No. 174-B is clearly applicable to petitioners without any further action on the part of the Commission, and there is no reason or basis for further administrative proceedings before the Commission to determine petitioners' status with respect to these sales. On the other hand, Union alleges in its complaint that it does not make any sales of the type involved in the *Phillips* case or any other sales subject to the Commission's jurisdiction.

Another material distinction between the position of petitioners and that of Union is that Order No. 174-B instead of Order No. 174-A is involved in this case, and Order No. 174-B contains a provision (Section 154.91(b)) expressly asserting jurisdiction over certain sales of gas for processing by requiring producers selling to the processing plant to file, in the absence of a filing by the plant operator, "where the payments by such operator to the producers represent a percentage of the proceeds of the sale thereof by the operator." (Appendix, pp. 22-23) This provision was not contained in Order No. 174-A and, therefore, was not before the Court of Appeals in the *Union* case. The complaint shows that petitioners make such sales, which are described in category (c) (ii) above (p. 6).[4] Order No. 174-B applies to such sales without any fur-

[4]Petitioners contend that these sales for processing are not sales "in interstate commerce" under Section 1(b) of the Natural Gas Act, relying upon *Coe v. Errol*, 116 U.S. 517; *Crescent Cotton Oil Co. v. Mississippi*, 257 U. S. 129; *Utah Power & Light Co. v. Pfost*, 286 U.S. 165; and other cases following the general rule that commerce does not begin until manufacturing or processing of raw products is completed. *Cf. Michigan Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157, 168, where this Court made an analogy between the processing of gas and the conversion of mechanical energy into electrical energy, which conversion was held in *Utah Power & Light Co. v. Pfost*, *supra*, to be "essentially local" and not a part of interstate commerce (286 U.S. at 181).

ther action being necessary on the part of the Commission, and with respect to these sales there is likewise no reason or basis for further proceedings before the Commission to determine whether petitioners are subject to Order No. 174-B.

Therefore, at least with respect to the two types of sales above described, the only action remaining is the enforcement by the Commission of Order No. 174-B against petitioners. These circumstances place petitioners in substantially the same position as was CBS and authorize judicial review of Order No. 174-B.

II. The Court of Appeals erred in directing dismissal of the complaint and in affirming the action of the trial court denying a temporary injunction in view of the threat of criminal penalties and the undenied facts showing disruption of petitioners' business and other irreparable injury.

As heretofore stated, petitioners have not filed applications for certificates or rate schedules covering their sales of gas for processing over which the Commission has asserted jurisdiction by and under Order No. 174-B. Nor have any of the operators of the processing plants to whom petitioners make such sales made filings or been authorized by petitioners to make filings on their behalf. Therefore, insofar as these sales are concerned, petitioners have not complied with the directives of Order No. 174-B.

Section 21 of the Natural Gas Act (15 U.S.C. 717t) provides penalties in the form of a fine up to $5,000 and imprisonment up to two years for willful and

knowing violations of the Natural Gas Act and a fine of up to "$500 for each and every day during which" any person "willfully and knowingly violates any rule, regulation, restriction, condition, or order made or imposed by the Commission under authority" of that Act (Appendix, pp. 8-9).

That severe penalty provisions of this type provide a sufficient ground for invoking equity jurisdiction and for the issuance of a temporary injunction is well settled. As stated in *Rochester Telephone Corp. v. United States*, 307 U.S. 125, 132, "the requirements of equity are satisfied if disregard of the Commission's adverse action entails threat of oppressive penalties." "If an administrative order has that effect it is reviewable and does not cease to be so merely because it is not certain whether the Commission will institute proceedings to enforce the penalty incurred under its regulations for non-compliance." *Columbia Broadcasting System v. United States*, 316 U.S. 407, 417-418. Other cases recognizing that such extreme penalty provisions make the remedies at law inadequate and authorize resort to equity for protection during the determination of the validity of the act or order in question are: *Panama Refining Co. v. Ryan*, 293 U.S. 388, 414; *Ex Parte Young*, 209 U.S. 123, 162-165; *Terrace v. Thompson*, 263 U.S. 197, 214; *Philadelphia Co. v. Stimson*, 223 U.S. 605, 621; *Shields v. Utah Idaho Ry. Co.*, 305 U.S. 177, 183; *Stafford v. Wallace*, 258 U.S. 495, 512.

The undenied facts alleged in petitioners' verified complaint and set forth in the supporting affidavit showing disruption of petitioners' business and other

irreparable injury (pp. 9-10, *supra*) likewise authorize this suit in equity and for declaratory judgment and justify the issuance of a temporary injunction. *Columbia Broadcasting System v. United States*, *supra*; *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 141; *Stark v. Wickard*, 321 U.S. 288, 303-305; *Hynes v. Grimes Packing Co.*, 337 U.S. 86, 98-100; *Ohio Oil Co. v. Conway*, 279 U.S. 813, 815.

III. The questions presented are of importance to the natural gas producing industry and in the administration of the Natural Gas Act.

The 174 series of orders represents the first attempt by the Federal Power Commission to regulate independent producers of natural gas since the opinion of this Court in *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672. These orders and the Commission's action thereunder have caused uncertainty and confusion among producers of natural gas and have resulted in numerous suits being filed by individuals and companies which are pending in courts below.

If certain sales of independent producers are to be regulated under the Natural Gas Act, as declared by this Court in the *Phillips* case, it is important that this regulation be initiated and accomplished in an orderly manner and within the bounds of the Commission's jurisdiction defined in that case and other cases. To delay judicial review of Commission action alleged to be beyond the Commission's authority and to refuse to give the protection afforded by a temporary injunction while the validity of the Commission's action is being determined will result in con-

tinued confusion and uncertainty and will subject independent gas producers to continued irreparable injuries and the constant threat of oppressive penalties.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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April 20, 1956

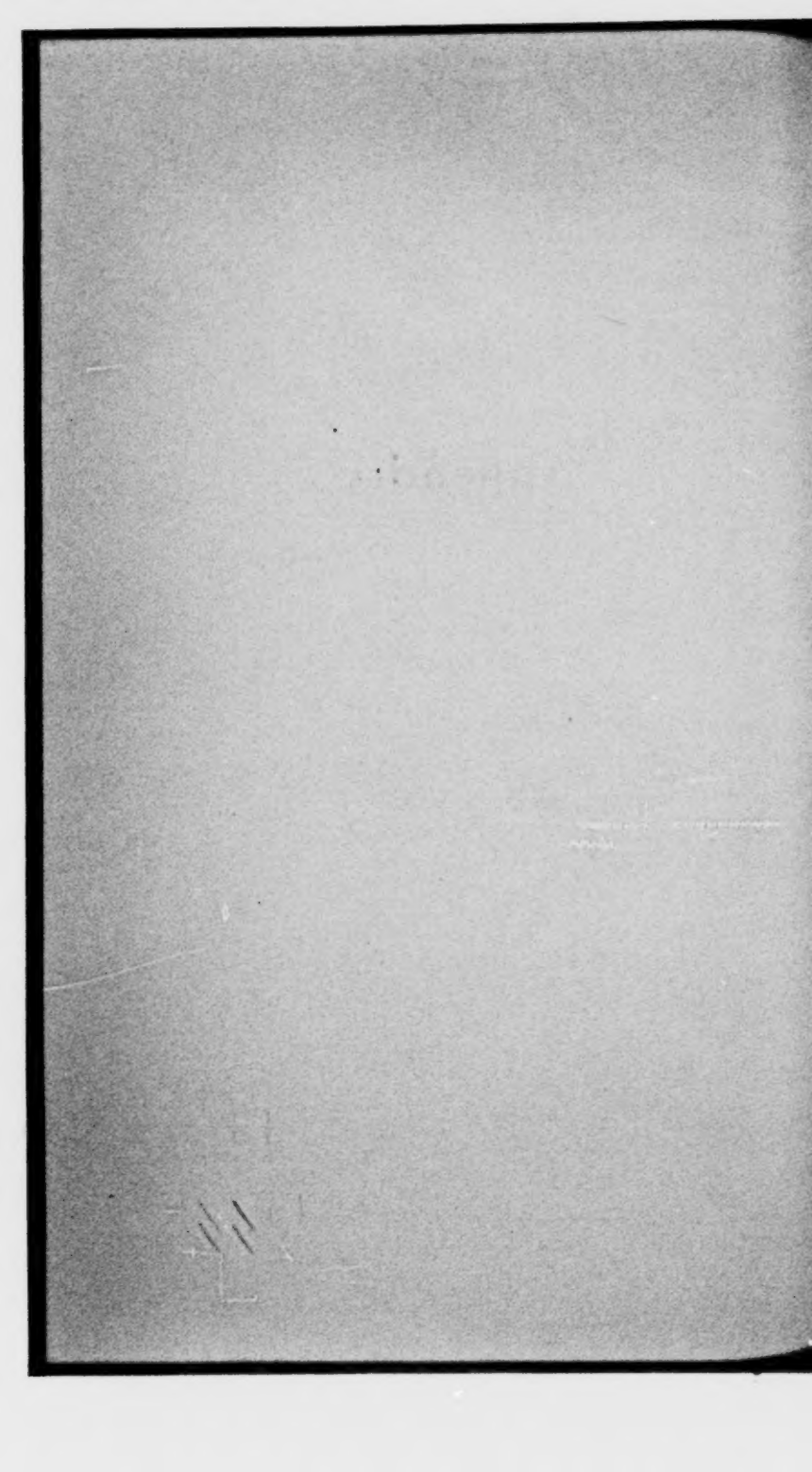
CERTIFICATE OF SERVICE

I, Jesse P. Luton, Jr., counsel of record for Gulf Oil Corporation and Gulf Refining Company, petitioners herein, hereby certify that on the 19th day of April, 1956, I served copies of the foregoing petition for writ of certiorari on the several parties thereto as follows:

1. On the United States by mailing a copy, in a duly addressed envelope with air mail postage prepaid, to The Solicitor General, Department of Justice, Washington 25, D. C.
2. On the Federal Power Commission and the individual members comprising the Commission by mailing a copy, in a duly addressed envelope with air mail postage prepaid, to Willard W. Gatchell, Esq., General Counsel of the Commission, at the offices of the Commission, Washington 25, D. C.

JESSE P. LUTON, JR.
P. O. Drawer 1290
Fort Worth 1, Texas
Counsel for Petitioners

Appendix



APPENDIX A

(Relevant Provisions of the Natural Gas Act)

Sec. 1. (a) As disclosed in reports of the Federal Trade Commission made pursuant to Senate Resolution 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is hereby declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.

(b) The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas. (52 Stat. 821, 15 U. S. C. 717)

Sec. 4. (c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all

rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulations, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, or State commission, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules

and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect: *Provided,* That the Commission shall not have authority to suspend the rate, charge, classification, or service for the sale of natural gas for resale for industrial use only; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the in-

creased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible. (52 Stat. 822, 15 U. S. C. 717c)

Sec. 5. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates. (52 Stat. 823, 15 U.S.C. 717d)

Sec. 7. (b) No natural-gas company shall abandon

all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment. (52 Stat. 824, 15 U.S.C. 717f(b))

(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within

ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however*, That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest. (52 Stat. 825, as amended, 56 Stat. 83; 15 U.S.C. 717f(c))

Sec. 19. (a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this act to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or

modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon.

(b) Any party to a proceeding under this act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if

supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 346 and 347).

(c) The filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order. (52 Stat. 831, 15 U.S.C. 717r)

Sec. 21. (a) Any person who willfully and knowingly does or causes or suffers to be done any act,

matter, or thing in this act prohibited or declared to be unlawful, or who willfully and knowingly omits or fails to do any act, matter, or thing in this act required to be done, or willfully and knowingly causes or suffers such omission or failure, shall, upon conviction thereof, be punished by a fine of not more than $5,000 or by imprisonment for not more than two years, or both.

(b) Any person who willfully and knowingly violates any rule, regulation, restriction, condition, or order made or imposed by the Commission under authority of this act, shall, in addition to any other penalties provided by law, be punished upon conviction thereof by a fine of not exceeding $500 for each and every day during which such offense occurs. (52 Stat. 833, 15 U. S. C. 717t)

APPENDIX B

(Relevant Provisions of the Administrative Procedure Act)

Sec. 2. (c) "Rule" means the whole or any part of any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of any agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing upon any of the foregoing. "Rule making" means agency process for the formulation, amendment, or repeal of a rule.

(d) "Order" means the whole or any part of the final disposition (whether affirmative, negative, injunctive, or declaratory in form) of any agency in any matter other than rule making but including licensing. "Adjudication" means agency process for the formulation of an order.

(g) "Agency proceeding" means any agency process as defined in subsections (c), (d), and (e) of this section. "Agency action" includes the whole or part of every agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act. (60 Stat. 237, 5 U.S.C. 1001)

Sec. 5. In every case of adjudication required by statute to be determined on the record after oppor-

tunity for an agency hearing, except to the extent that there is involved (1) any matter subject to a subsequent trial of the law and the facts de novo in any court; (2) the selection or tenure of an officer or employee of the United States other than examiners appointed pursuant to section 1010 of this title; (3) proceedings in which decisions rest solely on inspections, tests, or elections; (4) the conduct of military, naval, or foreign affairs functions; (5) cases in which an agency is acting as an agent for a court; and (6) the certification of employee representatives.

(a) Persons entitled to notice of an agency hearing shall be timely informed of (1) the time, place, and nature thereof; (2) the legal authority and jurisdiction under which the hearing is to be held; and (3) the matters of fact and law asserted. In instances in which private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the times and places for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

(b) The agency shall afford all interested parties opportunity for (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment where time, the nature of the proceeding, and the public interest permit, and (2) to the extent that the parties are unable so to determine any controversy by consent, hearing, and decision upon notice and in conformity with sections 1006 and 1007 of this title.

(d) The agency is authorized in its sound discretion, with like effect as in the case of other orders, to issue a declaratory order to terminate a controversy or remove uncertainty. (60 Stat. 239, 5 U.S.C. 1004)

Sec. 10. Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion.

(a) Any person suffering legal wrong because of any agency action or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

(b) The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

(c) Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise

final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

(d) Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings.

(e) So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error. (60 Stat. 243, 5 U.S.C. 1009)

APPENDIX C

(Federal Power Commission Order No. 174-B)

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Jerome K. Kuykendall, Chairman; Claude L. Draper, Nelson Lee Smith, Seaborn L. Digby and Frederick Stueck.

Docket No. R-138
Docket No. R-137

In the Matters of Compliance by natural-gas producers and gatherers with certificate and rate requirements and Consideration of the desirability of rules concerning automatic escalation and favored nation clauses in contracts by interstate natural-gas companies with producing companies.

ORDER NO. 174-B

Order Amending Order Prescribing Regulations Governing the Filing of Rate Schedules and Applications For Certificates of Public Convenience and Necessity by Producers and Gatherers of Natural Gas Which Are Also Natural Gas Companies, Waiving Accounting Requirements, and Relating to Automatic Escalation and Favored Nation Clauses in Contracts for the Sale of Natural Gas by Such Producers and Gatherers.

Docket No. R-138

1. By Order No. 174-A (superseding Order No. 174) issued August 6, 1954 (19 F. R. 5081), the Commission amended Part 154—Rate Schedules and Tar-

iffs, and Part 157—Applications for Certificates of Public Convenience and Necessity, Subchapter E—Regulations under the Natural Gas Act, Chapter I, Title 18, Code of Federal Regulations, by prescribing regulations governing the filing of rate schedules and applications for certificates of public convenience and necessity by persons engaged in the production and gathering of natural gas and held by the Supreme Court to be subject to all the requirements of the Natural Gas Act in *Phillips Petroleum Company v. Wisconsin, et al.*, 347 U. S. 672.

2. Numerous petitions for rehearing were filed and rehearing of Order No. 174-A was granted by order issued September 8, 1954 (19 F. R. 5952) for the purpose of receiving briefs and arguments in order that the Commission might determine whether to revoke, rescind or modify that order in any respect. Briefs and comments were filed and oral argument thereon was had on September 22 and 23, 1954. As a consequence, Order No. 174-A was modified by order issued September 24, 1954 (19 F. R. 6301) by which the filing dates prescribed in that order for some purposes were extended from October 1 to December 1, 1954. At the same time a clarifying change was made in the third paragraph of Section 154.94.

3. Upon consideration of the briefs and arguments made herein together with the experience gained in its operations to date under the existing provisions of Order No. 174-A, the Commission is of the opinion that it is necessary and desirable in the public interest and for its own convenience that those portions of

its General Rules and Regulations embodied in Order 174-A be further amended to read as set out below.

4. Many of the petitions for rehearing, although objecting to the lack of notice when the rules were originally adopted, recommended changes which would be of a distinctively substantive nature. Substantive rules, however, do not appear desirable in connection with the filings with which these rules are concerned and it is the intention of the Commission to relate these rules strictly to procedural matters. A number of petitions for rehearing urge that the Commission redefine independent producers so as to make more precise the applicability of the statute and rules to those persons brought within the scope of the Act by the decision of the United States Supreme Court in *Phillips Petroleum Company v. Wisconsin, et al.*, 347 U. S. 672. We recognize the desirability for clarification of jurisdiction in the light of the Phillips decision. This is of serious concern to many independent producers and clarification is desirable not only to prevent unnecessary filings but to assist those persons having honest doubt as to whether they come under the statute. We have no desire to extend our jurisdiction beyond statutory limits. This problem is substantive and not procedural and cannot be dealt with here. Hearings are scheduled and will be concluded at the earliest practicable time in order to facilitate prompt determination of jurisdictional questions.

5. Some of the petitions urged that the regulations be amended to relieve small producers from the requirements of the statute. The Act does not provide for exemptions from its requirements, but the regula-

tions for producers are herein revised in Sections 154.91, 154.92, 154.94 and 157.23 to further simplify the filings by small producers.

6. It was also urged that the Commission limit the applicability of the Act to those operators selling gas in interstate commerce after processing or gathering and acting for other working interests. The rules are here revised by the addition of a paragraph in Section 154.91 under which operators may file in those situations where the purposes of the statute as to certificate requirements and rate fixing may be made fully effective, without calling for separate filings by those having working interests, although such interests may also file if they care to do so. It is expected that by this paragraph a large number of parties having working interests may be relieved of the filing requirements, although, of course, they are not and cannot be exempted from the statute, if, by reason of their activities, they come within its terms.

7. The map required in Section 157.25 as an exhibit in support of a certificate application is not intended to be a topographic survey map but a general sketch. A further exhibit is also required as set forth in paragraph 10 below.

8. The statement in the rules with respect to the abandonment of service has been misconstrued and for that reason is being revised to quote Section 7(b) of the Act. A proviso is added, however, that nothing in the rules shall be construed as interfering with or intended to interfere with or prevent compliance by a natural-gas company with valid conservation orders

of a State agency relating to the production of natural gas.

9. There has been some confusion as to the notices or copies to be furnished to State commissions and the references thereto in the rules are eliminated. Other minor revisions of a technical or clarifying nature are also made in some of the sections below.

Docket No. R-137

10. In Docket No. R-137 the Commission has under consideration the desirability of adopting rules within the terms of the Natural Gas Act either in connection with the issuance of certificates of public convenience and necessity whereby contracts between producers and interstate pipeline companies containing automatic escalation and favored nation clauses would be declared not to be admissible as evidence of gas supply, or in connection with rate-making whereby increased payments made under escalation provisions but having no relation to additional or improved service or gas supplies to an interstate transporter could be disallowed, or in some other connection whereby effective action can be taken in the premises pursuant to the terms of the Act.

11. General public notice of proposed rule-making in Docket No. R-137 was given by publication in the Federal Register on May 13, 1954 (19 F. R. 2768) and mailing notices to interested parties, including State and Federal regulatory agencies. This notice invited data, views, comments, and suggestions concerning the contract provisions mentioned and set oral arguments thereon for September 9, 1954. By

notice similarly published on July 22, 1954 (F. R. 4543) the date for oral argument was continued to November 4, and the argument was heard on November 4 and 5, 1954.

12. Views, comments and suggestions were filed by numerous persons, including the representatives of State regulatory agencies, companies engaged in local distribution of natural gas, interstate pipe-line companies, and independent producers and gatherers. Representatives of all of these diverse interests took part in the oral argument.

13. As a result of the representations submitted both orally and in writing in Docket No. R-137 and in view of the desirability of clarifying the showing to be made in this connection by natural-gas companies seeking certificates of public convenience and necessity, the contracts of sale are hereinafter required as an exhibit in support of an application under Sections 157.24 and 157.25 for a certificate of public convenience and necessity. Escalation clauses of the type referred to in Section 157.25, *Exhibit B*, below, in the sales contracts of independent producers so submitted should not be considered in support of any application nor given effect by the Commission. Upon further consideration of the matter, the Commission *finds:*

(1) Sections 154.91, 154.92, 154.94, 154.95, 154.97, 154.98, 157.23, 157.24, 157.25 and 157.28 of the Regulations under the Natural Gas Act prescribed by Order No. 174-A, as amended by the order issued September 24, 1954 herein,

should be further revised for the reasons and in the manner set forth above.

(2) Adoption and promulgation of the proposed revisions are necessary and appropriate to carry out the provisions of the Natural Gas Act.

(3) For convenience, it is appropriate that those sections of Order No. 174-A which are not revised hereby be published together with the revised sections referred to above and that the order as so revised be designated as Order No. 174-B.

(4) The points and issues raised by the petitions for rehearing which are not covered by the revisions hereinafter made should be denied.

(5) From the circumstances referred to in the recitals above set forth, it appears that good cause exists for immediate issuance of the following regulations and it is unnecessary in the public interest that notice or further public proceedings be had prior to the adoption of such revised regulations.

(6) Upon full consideration of the representations made in Docket No. R-137; escalation clauses of the types referred to in Section 157.25, Exhibit B, below are not in the public interest and such clauses will not be considered as evidence in support of any application for a certificate of public convenience and necessity or for other purposes nor given effect by the Commission.

(7) Further proceedings in Docket No. R-137 are not necessary.

The Commission, acting pursuant to the authority granted by the Natural Gas Act, particularly Sections 4, 7 and 16 thereof (52 Stat. 822, 824, 830; 15 U. S. C. 717c, 717f and 717o), and subject to the provisions of Sections 3 and 4 of the Administrative Procedure Act (60 Stat. 238; 5 U. S. C. 1002, 1003), *orders:*

(A) Part 154-Rate Schedules and Tariffs—of Subchapter E, Regulations under the Natural Gas Act, Chapter I of Title 18, Code of Federal Regulations, is amended by adding thereto new sections reading as follows:

§ 154.91 Applicability.—(a) An "independent producer" as that term is used in this Part means any person as defined in the Natural Gas Act who is engaged in the production or gathering of natural gas and who transports natural gas in interstate commerce or sells natural gas in interstate commerce for resale, but who is not primarily engaged in the operation of an interstate pipeline.

(b) The filings with regard to all sales required under § 154.92, § 154.94 and § 157.23 may be made by (1) an operator of one or more wells under co-ownership, (2) an operator where a group of producers are unitized for production and sale, or (3) an operator of a plant processing natural gas and located in the producing area of the gas which it processes and the payments by such operator to the producers represent a percentage of the proceeds of the sale thereof by the operator. Where filings are made by an oper-

ator under this paragraph, the parties to the operating arrangement, and those producers who sell to the processing plant described in clause (3) herein, need not file hereunder. When a filing is made by an operator under clauses (1) or (2) herein, he shall submit therewith (i) a list of all persons having working interests involved in the sale of natural gas covered by his filing, (ii) a list of the parties to the operating arrangement, and (iii) a statement of their percentage of their interests. When a filing is made under clause (3) herein, the operator shall file a list of the producers from whom the natural gas is purchased, showing the percentage received by each from the sales. The operator filing hereunder shall submit every twelve months thereafter a statement showing any changes in the several respects since the list was previously submitted.

§ 154.92 *Filing of Rate Schedules by Independent Producer.*—(a) Every independent producer who, on or since June 7, 1954, has engaged in the interstate transportation or sale of natural gas subject to the jurisdiction of the Commission shall on or before December 1, 1954, file with the Commission rate schedules, as defined in Section 154.93 hereof, setting forth the terms and conditions of service and all rates and charges for such transportation or sale effective on June 7, 1954. To each such rate schedule there shall be attached a statement showing actual billing for a recent

month in sufficient detail to show how the billing amount is determined.

(b) Every independent producer who, subsequent to the effective date of these rules, proposes to initiate an interstate transportation or sale of natural gas subject to the jurisdiction of the Commission to an existing or new customer shall file with the Commission not less than 30 days nor more than 90 days prior to the date such transportation or sale is proposed to be initiated a rate schedule, as defined in Section 154.93 hereof, setting forth the terms and conditions of service and all rates and charges for such transportation or sale. To each such rate schedule there shall be attached a statement showing estimated sales and billing for the first month of service, in sufficient detail to show method of billing and prices used. The statement shall also give the proposed date of commencement of service. A complete copy of all material shall be furnished to each purchaser under the rate schedule. With each such filing there shall be submitted a list of parties to whom such material has been mailed.

(c) Every independent producer who transports or sells less than 100,000 Mcf annually of natural gas subject to the jurisdiction of the Commission may, in lieu of the requirements of paragraphs (a) and (b) of this Section file a statement showing (1) the approximate annual volume involved, (2) the rate charged therefor, (3) the name of the purchaser, and (4) the geo-

graphical location (field, county, and State) at which delivery is made.

§ 154.93 *Rate Schedule Defined.*—For the purpose of Sections 154.92 through 154.101 hereof "Rate Schedule" shall mean the basic contract and all supplements or agreements amendatory thereof, effective and applicable on and after June 7, 1954, showing the service to be provided and the rates and charges, terms, conditions, classifications, practices, rules and regulations affecting or relating to such rates or charges, applicable to the transportation of natural gas in interstate commerce or the sale of natural gas in interstate commerce for resale subject to the jurisdiction of the Commission.

§ 154.94 *Changes in Rate Schedules.*—(a) No change shall be made in any rate, charge or service in effect on and after June 7, 1954, for the interstate transportation or sale of natural gas in interstate commerce subject to the jurisdiction of the Commission by any independent producer required to file rate schedules pursuant to Section 154.92 hereof, without first filing a change in rates pursuant to Section 4(d) of the Natural Gas Act and in accordance with this section.

(b) Every change in any rate schedule, rate, charge, classification or service effective or applicable to a sale subject to the jurisdiction of the Commission as of June 7, 1954, and on file with the Commission, or required to be filed pursuant to Section 154.92, or in any rate schedule,

rate, charge, classification or service effective or applicable to a sale subject to the jurisdiction of the Commission initiated subsequent to June 7, 1954, on file with the Commission, or required to be filed with the Commission pursuant to Section 154.92 shall be filed with the Commission in duplicate not less than 30 days nor more than 90 days prior to the date such change in rate schedule is proposed to be made effective.

(c) The operation of any provision of the rate schedule providing for future or periodic changes in the rate, charge, classification, or service after June 7, 1954, or the operation of any like provision in any initial rate schedule filed after June 7, 1954, shall constitute a change in rate schedule.

(d) Any change in any rate schedule, rate, charge, classification, or service provided in a rate schedule in effect on June 7, 1954, which by the terms of said rate schedule is to be operative after June 7, 1954 and prior to September 15, 1954, may be filed on less than thirty days' prior notice, subject nevertheless to the right of the Commission to suspend any such proposed change, if the Commission in any case shall, within thirty days after the date of filing, find it necessary to suspend such proposed change. If any such proposed change is suspended, the suspension period will begin with the designated effective date of such change.

(e) With each change in rate schedule there shall be submitted reasons, nature, and basis for the proposed change, and the following informa-

tion and data: (i) the date on which such filing is proposed to be made effective; (ii) a comparative statement of sales made and revenues therefrom by months under the then effective rate schedule and under the proposed changed rate schedule, or rate, charge, classification or service contained therein for the 12 months immediately preceding and for the 12 months immediately succeeding the proposed effective date of the rate schedule tendered for filing. Actual data shall be used wherever possible and any estimates shall be so designated and explained. The statement shall be subdivided by customers and delivery points when more than one is involved.

(f) If the proposed change in a rate schedule will result in an increase in a rate or charge, there shall also be submitted a full statement in support of such increase. A complete copy of all material shall be furnished to each party to the rate schedule. With each such filing there shall be submitted a list of the parties to whom such material has been mailed.

(g) Every independent producer who transports or sells less than 100,000 Mcf annually of natural gas subject to the jurisdiction of the Commission may, in lieu of the requirements of the foregoing paragraphs in this Section, file a statement showing (1) the approximate annual volume involved; (2) the rate charged therefor; (3) the name of the purchaser; and (4) the geographical location (field, county and State) at which delivery is made.

§ 154.95 *Oral Agreements.*—If any rate schedule or change in a rate schedule is not in writing, its terms shall be reduced to writing and filed with the Commission. If the parties are not able to agree to the precise terms within a reasonable time, the applicant shall file, in duplicate, a statement of his understanding of the agreement, serving a copy thereof on the other parties to the agreement. Such other parties, in the latter event, may subsequently file, in duplicate, their understanding of the agreement.

§ 154.96 *Filing Date.*—Filing date means the day on which a rate schedule, or a change in rate schedule, is received in the office of the Secretary of the Commission in compliance with the requirements of Sections 154.92 through 154.99 of these Regulations.

§ 154.97 *Cancellation or Termination.*—When a rate schedule or part thereof is proposed to be cancelled or is to terminate by its own terms and no new rate schedule or part thereof is to be filed in its place, the filing company shall notify the Commission of the proposed cancellation or termination at least 30 days prior to the proposed effective date of such cancellation or termination. With such notice the company shall submit a statement showing the reasons for the cancellation or termination and a certification that such notice of cancellation or termination has been served on the affected party or parties, together with names of parties to whom the notice has been mailed.

§ 154.98 *Waiver of Notice Requirements.*—Upon application and for good cause shown, the Commission may by order provide that a rate schedule or a change in rate schedule shall be effective on less than 30 days' notice. The Commission upon request and for good cause shown may permit a rate schedule or a change in rate schedule to be filed prior to 90 days before the effective date.

§ 154.99 *Number of Copies.*—Two copies of any rate schedule or part thereof, and material required by Section 154.95 to be filed therewith, and Notices of Cancellation or Termination submitted for filing, must be supplied to the Commission. The Commission reserves the right to request additional copies. All copies are to be included in a single package, insofar as possible, together with a letter of transmittal and other material and information required by these rules, addressed to the Secretary of the Federal Power Commission, Washington 25, D. C.

Such letter of transmittal shall contain a complete list of all material being filed, properly designated so that each item is easily identifiable.

§ 154.100 *Rejection of Rate Schedules and Material Submitted for Filing.*—The Commission reserves the right to reject any rate schedule or material submitted for filing which fails to comply with the requirements of Sections 154.92 through 154.99.

§ 154.101 *Acceptance for Filing not Approval.*

—Acceptance for filing of any rate schedule or part thereof, or of a Notice of Cancellation or Termination, is not to be construed as approval by the Commission, nor to serve in lieu of any requirements under Section 7 of the Natural Gas Act.

§ 154.102 *Applicability of Sections 154.92 through 154.101.*—Sections 154.92 through 154.-101 hereof shall be applicable only to those persons specified in Section 154.91 hereof.

(B) Part 157—Applications for Certicates of Public Convenience and Necessity under Section 7 of the Natural Gas Act, as amended, Subchapter E, Regulations under the Natural Gas Act, Chapter I of Title 18, Code of Federal Regulations, is amended by adding thereto new sections reading as follows:

§ 157.23 *Applications for Certificates of Public Convenience and Necessity by Independent Producer.*—(a) Every independent producer of natural gas as that term is defined in Section 154.91 who, on or since June 7, 1954, has engaged in the interstate transportation or sale of natural gas subject to the jurisdiction of the Commission, and who has not heretofore obtained from the Commission a certificate of public convenience and necessity pursuant to Section 7 of the Natural Gas Act, as amended, shall, on or before December 1, 1954, file with the Commission an application (original and 14 copies) in accordance with Sections 157.24 through 157.27. Independent producers whose sales of natural gas

subject to the jurisdiction of the Commission amount in the aggregate to less than 1,000,000 Mcf annually, may, in lieu of the foregoing, file by December 1, 1954 an application (original and five copies) containing the information called for by the attached Exhibit A. Pending action by the Commission on an application hereunder, the service for which authorization is sought shall be continued.

(b) No independent producer of natural gas shall, subsequent to the issuance of these rules, engage in any new service with respect to the transportation of natural gas in interstate commerce or sale of such natural gas for resale in interstate commerce subject to the jurisdiction of the Commission without approval of the Commission, evidenced by a certificate of public convenience and necessity authorizing such transportation or sale upon application (original and 14 copies) pursuant to Sections 157.24 through 157.27. Independent producers whose sales of natural gas subject to the jurisdiction of the Commission will amount in the aggregate to less than 1,000,000 Mcf annually may, in lieu of the foregoing, file an application (original and five copies) containing the information called for by the attached Exhibit A. Where the economic feasibility of a new pipe line or important extension or expansion of an existing pipe line depends upon proof of an adequate gas supply, all related applications necessary to effectuate the service shall be filed within time to enable the

Commission to consider all related matters concurrently.

(c) Filings hereunder may be made by an operator as provided in § 154.91 hereof.

§ 157.24 *Contents of applications.*—(a) Every application for a certificate of public convenience and necessity required under § 157.23 hereof shall be filed with the Commission and shall set forth in the order indicated the following:

(1) The exact legal name of the applicant; if the applicant is a corporation, the State or territory under the laws of which the applicant is organized, the location of applicant's principal place of business, and the names of all States where applicant is authorized to do business.

(2) The same data required by paragraph (1) of this section with respect to any predecessor in interest of the applicant bona fide engaged in the transportation or sale of natural gas subject to the jurisdiction of the Commission on June 7, 1954.

(3) The name, title, and post office address of the person to whom correspondence or communications in regard to the application is to be addressed. Unless advised to the contrary, the Commission will serve all notices, orders, and other papers, service of which is required, upon the person so named.

(4) A statement of pertinent facts showing that applicant or a predecessor in interest of applicant was a natural-gas company within the

meaning of the Natural Gas Act and was bona fide engaged in transportation of natural gas in interstate commerce or sale of natural gas in interstate commerce for resale on June 7, 1954, or upon commencement of the proposed transportation or sale of natural gas would be a natural-gas company. Without limitation upon the requirements of this paragraph, such statement shall include a showing of:

(i) The sources of the gas (a) produced by applicant or predecessor and (b) purchased by applicant or predecessor. In case of gas produced, give the approximate location of the fields and the points of delivery, and in the case of gas purchased, the names of the sellers and points of delivery.

(ii) The route or routes of the pipe lines over which such transportation or sale of natural gas was or will be accomplished.

(iii) Any communities served on June 7, 1954 or proposed to be served (a) at wholesale or (b) at retail.

(iv) The names of, and points of delivery to, any main line industrial customers (i.e., not located within communities under (iii) above) purchasing or proposing to purchase 25,000 Mcf or more per year. Such main line industrial customers purchasing 100,000 Mcf or more per year, shall be given the identifying designations I-1, I-2, etc., which designations shall be used in lieu of names on Exhibit A of the application.

(v) Any major appurtenant properties and facilities, such as compressor stations, gasoline plants, dehydration plants, purification plants, and gas storage projects.

(b) Any information required which is already on file with the Commission may be incorporated by reference. If an applicant is unable to secure required information in time for filing with his application, a statement setting forth the reasons for his failure to file the missing information should be submitted with a request for further time, which may be granted up to 90 days.

§ 157.25 *Necessary exhibits.*—There shall be filed with the application as a part thereof the following exhibits:

Exhibit A. Map. Each applicant under Section 157.24 shall file as a part of his application a general map or sketch of applicant's facilities for the production, transportation, or sale of natural gas as Exhibit A. The map need be only of sufficient scale and in sufficient detail to show the general geographical location of the properties.

(a) The location of gas fields from which gas is or will be produced by applicant or affiliated companies or at which gas is or will be purchased by applicant.

(b) The location of applicant's principal pipe lines and the diameters thereof.

(c) The points of connection with the fa-

cilities or pipe-line systems of other companies.

(d) The designation of points of delivery of gas to applicant's system.

(e) The communities served or proposed to be served at wholesale and at retail, indicating wholesale by a small square and retail by a small circle.

(f) The designation of points of delivery of gas from applicant's system, including points of delivery to main line industrial customers purchasing 100,000 Mcf or more per year. Such main line industrial customers are to be designated I-1, I-2, etc. as indicated in § 157.24 (a) (4) (iv).

Exhibit B. Contracts. Conformed copy of each contract for sale or transportation of gas for which a certificate is requested: *Provided, however,* That contracts on file with the Commission in other proceedings may be included by reference as heretofore provided in § 157.24 (b); and provided further, That acceptance of contracts hereunder shall not be construed as approval of the rates therein contained under Part 154 hereof or under the Natural Gas Act. Escalation clauses in contracts submitted hereunder on or after May 1, 1955 will not be considered in support of any certificate application or otherwise given effect by the Commission if under such clauses: (a) provision is made for adjustment of the price of the seller

by reason of changes in the prices received by the purchaser upon resale; or (b) if provision is made for adjustment of the price of the seller by reason of the payment of higher prices by other purchasers in the same or other producing areas.

§ 157.26 *Form of filing.*—An application under § 157.24 and § 157.25 shall be in compliance with § 1.15 and § 1.17 of this chapter, and in addition the original of the application (which shall include the originals of all exhibits accompanying said application) shall be verified under oath by a person having knowledge of the matters therein set forth.

§ 157.27 *Other information.*—The applicant may be required to furnish such additional information as the Commission may deem pertinent.

§ 157.28 *Abandonment of Service.*—No independent producer as herein defined shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment. *Provided, however,* That nothing herein shall be construed as interfering or as intended to interfere with or to pre-

vent compliance by a natural-gas company with valid conservation orders of a State agency relating to the production or gathering of natural gas.

§ 157.29 *Applicability of Sections 157.23 to 157.28.*—Sections 157.23 through 157.28 hereof shall be applicable only to an independent producer as defined in Section 154.91 of these Rules.

(C) The amendments of rules and regulations herein prescribed are hereby made effective immediately upon issuance hereof.

(D) Until the further order of the Commission, the rules and regulations requiring natural-gas companies to keep and maintain their accounts in accordance with the Commission's Uniform System of Accounts for Natural Gas Companies (18 CFR Chapter I, Subchapter F) and to submit reports thereon shall not apply to independent producers as defined in Section 154.91.

(E) Order No. 174-A issued August 6, 1954 is hereby revised and as revised herein shall be designated as Order No. 174-B.

(F) The petitions for rehearing filed herein are denied with respect to all other points and issues raised in such petitions.

(G) The proceedings in Docket No. R-137 are hereby terminated.

(H) The Secretary of the Commission shall cause publication of this Order to be made in the Federal Register.

By the Commission. Commissioner Digby dissenting.

(S.) LEON M. FUQUAY,
Secretary.

Adopted: December 16, 1954.
Issued: December 17, 1954.

EXHIBIT A

(Section 157.23)

Application for Certificate of Public Convenience and Necessity by Class B Independent Producer[1]

(File original and five copies)

(1) Name of Applicant. .....
(2) State of Organization. .....
(3) Location of Principal Place of Business. .....
(4) Names of States in Which Authorized to do Business. .....
(5) Person Responsible for Application. .....
  (a) Name and Title. .....
  (b) Mailing Address. .....
(6) Description of Facilities Used for Operations for Which Certificate is Requested (where applicable).
  (a) Pipelines.
    (i) Location. .....
    (ii) Length and diameter. .....
    (iii) Capacity (Mcf daily). .....
  (b) Compressor Stations.
    (i) Location. .....
    (ii) Horsepower. .....
    (iii) Capacity (Mcf daily). .....

[1] Independent producers defined in Section 154.91 as transporting in interstate commerce or selling in interstate commerce for resale a total of less than 1,000,000 Mcf per year of natural gas.

(c) Gasoline Plants.
  (i) Location. .....
  (ii) Capacity (Mcf daily) .....
(d) Dehydration Plants.
  (i) Location. .....
  (ii) Capacity (Mcf daily). .....
(e) Purification Plants.
  (i) Location. .....
  (ii) Capacity (daily). .....
(f) Storage Projects.
  (i) Location. .....
  (ii) Maximum volumes that can be stored Mcf. .....

(7) Gas Supply.
(a) Own Production.
  (i) Name and location of field. .....
  (ii) Acreage Controlled. .....
(b) Gas Purchased.
  (i) Name of Seller. .....
  (i) Name and location of field. .....
  (iii) Point of delivery to applicant. .....

(8) Gas Sales or Transportation Contracts (for each contract).[2]
(a) Name of Purchaser. .....
(b) Point of delivery. .....
(c) Contract volumes Mcf (daily or annually), indicating pressure base. .....
(d) Price at time of filing. .....
(e) Date of contract. .....
(f) Term of contract. .....
(g) Special conditions (if any). .....

[2] Contracts on file as rate schedules may be incorporated by reference.

Docket No. R-138
Docket No. R-137

In the Matters of Compliance by natural-gas producers and gatherers with certificate and rate requirements and Consideration of the desirability of rules concerning automatic escalation and favored nation clauses in contracts by interstate natural-gas companies with producing companies.

SMITH AND STUECK, Commissioners, *concurring:*

While concurring—under the circumstances here present—in the action of the Commission, we find ourselves in agreement with so much of what is said in the dissenting opinion that it seems appropriate to state with some particularity our position regarding the two major points covered therein.

We share fully the view that it would be highly desirable, if it were now possible, for the Commission to resolve prevailing uncertainties concerning the sweep of its jurisdiction under the *Phillips* decision, both to provide proper guidance to the industry affected and to minimize its own administrative burdens and dilemmas.

Depending upon whether prime emphasis is attached to the precise facts presented in the case of Phillips or to the broad language used in the dictum of the Supreme Court's opinion, arguments can be made for either of the extremes of possible interpretations of that decision: that our jurisdiction is limited to the sale of natural gas at the tailgate of the processing plant, or the point where the natural

gas enters the interstate pipe line, or, in the alternative, that our jurisdiction extends to every well-head sale in the field, or to the point of the first sale of natural gas for resale, wherever that may be, if interstate commerce turns out ultimately to be involved. Both interpretations have their advocates; both have been urged upon us.

Perhaps the correct answer lies in some as yet undetermined middle ground which would be conducive both to the reasonable and necessary flexibility and the continued good health of a vital industry and to the avoidance of a bogging down under its own weight of the whole regulatory process in the natural-gas field. It seems to us that it is the clear duty and responsibility of this Commission to take the initiative in seeking such a solution. So long as present uncertainties exist and unresolved questions accumulate, a situation which has been described as one of "administrative chaos" seems likely to exist.

Whether, however, we can now properly and wisely determine the precise boundaries of our jurisdiction in the areas of production and gathering is another matter. The question appears to have its substantive aspects, which might require further and more specific notice than that provided in this proceeding,—notwithstanding the fact that some of those who argued on rehearing went rather fully into this phase of the matter. Apart from that, certain of these issues are sharply posed in several proceedings now in hearing before us which, it is to be hoped, may well add to our understanding of the practical aspects and ramifications of these complex matters. It is for these

reasons that we join in the Commission's deferral of a more direct and satisfactory answer—through administrative definitions and rules of general application, which we think should be promulgated when it is feasible to do so—to this very important question at the present time.

Similarly, we are impressed by the strong arguments which have been made for the proposition that existing contracts under which sales of natural gas were being made by producers and gatherers to interstate pipe lines on June 7, 1954, and which the Commission's Order No. 174-A, as modified on September 24, 1954, has required to be filed by December 1, 1954, are to be regarded as complete entities, so that all of their terms—and not just certain selected segments—should be treated as initial rates. Failure to so treat them in effect, it seems to us, in many instances—particularly where stated price adjustments, upward or downward, are provided for on a definite and strictly adhered to periodic basis—might involve grave injustice and disregard some very elementary, obvious and important economic facts of life.

This, however, is not to say that we are compelled, as a matter of law, to so regard these filings, and therefore to disclaim all authority to suspend and, after notice, to examine into the reasonableness, from every point of view, of changes in the charges provided for under such contracts before they may become fully effective. It does seem to us that such provisions contained in pre-existing arm's length contracts are entitled to great weight and, as initial filings, may fairly be considered as *prima facie* rea-

sonable. Indeed, many, if not most, of them have been fully disclosed to all interested parties and relied upon in certificate proceedings where new pipe-line projects or extensions or enlargements of existing systems have been approved after being strongly supported by all concerned.

These are factors which, in our judgment, should be taken into account by the Commission and may well be controlling when, in the exercise of its administrative discretion under Section 4(e) of the Natural Gas Act, it is considering whether or not to suspend rate changes. But we are not now persuaded that in all such situations the Commission is, as a matter of law, confined to investigations pursuant to Section 5 of the Act,—which avenue of approach is, of course, always open to us in any situation wherein the reasonableness of rates subject to our jurisdiction is at issue.

Here again, however, it seems to us probable that the Commission will gain further information and knowledge regarding the impacts and significance of this facet of the problem during the course of the proceedings in Docket No. R-142, which are now scheduled to open on January 11, 1955. Therefore we deem it wise to defer action on this aspect of the matter for the present.

As indicated above, it is our understanding that, as to both of the points so ably developed in the dissenting opinion, the Commission is by its action at this time in no manner or degree foreclosing further consideration, and in no way precluding the future disposition, of these issues through the promulgation of interpretative rules of general application in appro-

priate proceedings, should the feasibility of such a course subsequently appear to be greater than it now does. On the contrary, the earlier supersession of Order No. 174 by Order No. 174-A, and the latter's amendment by the instant Order No. 174-B demonstrate, we believe, the Commission's willingness to follow a properly pragmatic approach to the problems entailed in its newly defined jurisdiction in the areas of production and gathering. We confidently expect, therefore, that further clarifications and refinements of a practical nature will be possible as we gain additional experience and understanding in these new fields of regulation.

Filed: December 16, 1954.

Issued: December 17, 1954.

NELSON LEE SMITH,
Commissioner.

FREDERICK STUECK,
Commissioner.

Docket No. R-138
Docket No. R-137

In the Matters of Compliance by natural-gas producers and gatherers with certificate and rate requirements and Consideration of the desirability of rules concerning automatic escalation and favored nation clauses in contracts by interstate natural-gas companies with producing companies.

DIGBY, Commissioner, *dissenting:*

Without restating my dissent from Order No. 174-A, I wish to adopt it by reference.

Agreeable to information submitted and experience gained since the issuance of Order No. 174-A, I dissent from this amendment of that order.

First: I believe that it is the Commission's responsibility and duty to define its jurisdiction over independent producers and gatherers of natural gas. Without such a decision by the Commission, hundreds of independent producers will file applications for certificates of public convenience and necessity, together with rate filings, in transactions entirely outside of the jurisdiction of the Federal Power Commission. By a positive determination at this time by the Commission, orderly regulation would be greatly advanced both with reference to certificate proceedings and rate filings and proceedings. In this connection, I would have the Commission give a broad but limiting definition of sales of natural gas by independent producers, gatherers, and processors of natural gas subject to regulation under the Natural Gas Act. The only pro-

vision in the Natural Gas Act as interpreted by the court decisions thereon concerning jurisdiction over producers and gatherers of gas is a reference to a "sale in interstate commerce of natural gas for resale." When the sale is made to a person who gathers gas and processes it in the state where it is produced and then the residue is sold in interstate commerce for resale, the first transaction, in my opinion, is purely a local one and not a sale in interstate commerce of natural gas for resale. This conclusion is certainly supported by the provisions of the Natural Gas Act. Section 1(b), applies "to the sale in interstate commerce . . . for resale" but "shall not apply to any other . . . sale." The Act does not, and the court opinions do not, imply that it applies to the sale for resale in interstate commerce but only "to the sale in interstate commerce for resale." It is my opinion that this order should define a jurisdictional sale of natural gas under the Natural Gas Act as a direct sale of natural gas in interstate commerce for resale, which sale of natural gas shall include all natural gas dedicated by contract for sale in interstate commerce for resale. In agreement with the language of the Act, I would prescribe that no other sales of natural gas are subject to the jurisdiction of the Federal Power Commission. In the Supreme Court decision in the Phillips case, the Court stated that Phillips admitted that it engaged in "the sale in interstate commerce . . . for resale." Therefore, the question of the sale in interstate commerce for resale was not an issue. The Court went to great lengths in detailing the facts concerning the wholesale sale by Phillips at the tailgate of its processing plant after production, gathering,

and processing of the gas. It has been argued with much force that a well-head sale of natural gas, even though it be a direct sale in interstate commerce for resale, is not subject to regulation for the reason it is neither a wholesale sale nor a sale in interstate commerce for resale after production and gathering have intervened. At the outset, in discussing this point, I expressed a view in favor of a broad but limiting definition of sales subject to regulation. I consider the definition which I have used to be broad and perhaps inclusive of some sales such as well-head sales which may be determined by the courts to be non-jurisdictional.

Second: It is my opinion that all fixed escalations or different prices of gas denominated in mills or cents contained in good faith arm's-length contracts in existence on the effective date of Order No. 174-A should be accepted as a part of the original rate and constituting one tariff or rate schedule not subject to suspension under Section 4 of the Natural Gas Act. These contracts were entered into at a time when the contracting parties had no thought of regulation of the price under the authority of the Natural Gas Act. Most of the contracts were entered into for long terms and supported by a dedication of gas reserves in compliance with requirements of the Federal Power Commission in certificate proceedings by transmission companies. Order No. 174-A requires that all of these contracts be filed as rate schedules. Under the provisions of the Natural Gas Act and in rate regulation in general the filer of an original rate schedule has a legal right to file an original rate of his own choos-

ing, subject of course to investigation upon complaint by an interested party or at the instance of the Federal Power Commission but not subject to suspension under Section 4 of the Natural Gas Act. The financial feasibility of transmission lines and distribution systems were predicated upon the over-all price conditions contained in these contracts. Securities issued and sold upon this understanding of the transaction are held by thousands of people who will be directly affected by our treatment of this subject. Accepting these original rate schedules including periodic changes in the price of gas would not be an approval of the rate as fair and reasonable but would simply treat the changes as component parts of an original rate schedule not subject to suspension.

Filed: December 16, 1954.
Issued: December 17, 1954.

SEABORN L. DIGBY,
Commissioner.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

C. A. No. 515-55

Filed February 23, 1955, Harry M. Hull, Clerk.

GULF OIL CORPORATION, AND GULF REFINING COMPANY, *Plaintiffs*,

VS.

FEDERAL POWER COMMISSION, ET. AL., *Defendants*

Washington, D. C.
Friday, February 18, 1955

RULING FROM THE BENCH ON MOTION FOR TEMPORARY INJUNCTION,
By the Hon. James R. Kirkland, Judge.

* * * * * *

THE COURT: In the case of Gulf Oil Corporation and Gulf Refining Company, plaintiffs, vs. the Federal Power Commission, C. A. No. 515-55, the plaintiff herein under date of February 4, 1955, filed in this Court a complaint for declaratory judgment, injunction and equitable relief, and has predicated that complaint largely upon the features and promulgations of an order designated as 174-B issued by the Federal Power Commission under date of December 17, 1954.

The defendant has not answered to the complaint, but instead the motion for a preliminary injunction, with accompanying points and authorities, has been opposed by the defendant through the filing of points

and authorities in opposition on February 14, 1955. Although the matter is here only on motion for a temporary injunction, the force of the argument is virtually that of an application for a permanent injunction.

Interestingly enough, the entire controversy revolves around the recent decision of the United States Supreme Court in the case of Phillips Petroleum Company vs. Wisconsin, which was decided June 7, 1954, and reported at 347 U. S. 672. It is interesting to a trial court to hear the defendant in the cause argue that before the Supreme Court of the United States the Power Commission itself took the position that wholesale transactions, especially at the source of what is known popularly as wet natural gas, were beyond its congressional grant of authority. However, in interpreting the various cases which have been before it, and through Mr. Justice Minton, page 682, the Supreme Court stated as follows:

> "Rather we believe that the legislative history indicates a congressional intent to give the commission jurisdiction over the rates of all wholesales of natural gas in interstate commerce, whether by a pipeline company or not, and whether occurring before, during, or after transmission by an interstate pipeline company. There can be no dispute that the overriding congressional purpose was to plug the 'gap' in regulation of natural gas companies resulting from judicial decisions prohibiting on federal constitutional grounds state regulation of many of the interstate aspects of the natural gas business. A sig-

nificant part of this gap was created by cases holding that 'the regulation of wholesale rates of gas and electrical energy moving in interstate commerce is beyond the constitutional powers of the States,' " citing Interstate Natural Gas Company vs. Federal Power Commission, 331 U. S. 682, 689.

Further along in its opinion the Court at page 685 stated:

"Regulation of the sales in interstate commerce for resale made by a so-called independent natural gas producer is not essentially different from regulation of such sales when made by an affiliate of an interstate pipeline company. In both cases, the rates charged may have a direct and substantial effect on the price paid by the ultimate consumers. Protection of consumers against exploitation at the hands of natural-gas companies was the primary aim of the Natural Gas Act," citing Federal Power Commission vs. Hope Natural Gas Company, 320 U. S. 591, 610.

Continuing at page 685:

"Attempts to weaken this protection by amendatory legislation exempting independent natural-gas producers from federal regulation have repeatedly failed, and we refuse to achieve the same result by a strained interpretation of the existing statutory language."

The Court has quoted from the opinion of the Supreme Court for two purposes: First, the growing

tendency in federal jurisdiction is to enlarge the scope of federal power to clearly control those things which upon entering the stream of interstate commerce become part of the volume and flow of interstate commerce. Since the famous case of Sheckner vs. N.R.A. down to the very latest case of United States vs. International Boxing Club of New York, that tendency has been present. Second, even though the Power Commission felt it lacked jurisdiction under the Natural Gas Act, nevertheless the Supreme Court went far beyond even the Commission's expectation and declared that in the wholesale phase the Commission very clearly and definitely had jurisdiction.

The entire matter before us is pitched upon the effect of the broad ruling in the Phillips Petroleum case. The date of the decision was referred to. It becomes important, since the Federal Power Commission, faced with the almost insurmountable task of regulating a very complicated industry, was compelled to exercise its regulatory powers. Accordingly, the Commission modified Order 174 and 174-A by issuing Order 174-B on December 7, 1954, to all those who might be involved.

Read from its four corners, Order 174-B attempts to get some semblance of order and regulation whereby rates, control and supervision of all types of both wet and dry natural gas from sources of supply to ultimate use in interstate commerce might come under general regulating authority.

It is noteworthy that in the Natural Gas Act itself there is a provision for suspending rates. One relief

which plaintiff is asking is a preliminary injunction. Plaintiff has entered into long-term contracts with escalator clauses touching upon the scale at which plaintiff shall sell either its raw natural gas or its refined natural gas, thus placing itself in the position of possibly receiving strict state supervision or loss of income, or both. Plaintiff is confronted with the problem that if it fails to obey the federal mandate issued by the Federal Power Commission, it subjects itself to very heavy penalties of some $500 a day for disobedience to the same.

In order that we may arrive at a proper posture of the case, in the argument and from the pleadings, the plaintiff contends that it has three types of natural gas. There is one type described as residue gas, which the Court understands are sales of gas after processing has been completed when the wet material, notably sulphur and other carbon compounds are removed from the natural product which nature has provided. We might call that the furnishing of dry gas. Counsel for the plaintiff concedes that under the ruling in the Phillips Petroleum case this type of sale is within the jurisdiction of the Federal Power Commission, and it is in compliance therewith.

However, there are two other types of sales or service which plaintiff contends are not within the Phillips Petroleum case. The second is one referred to as type (b). Type (b) is the sale of what has been designated as raw natural gas sold at the wellhead. From the plaintiff's point of view, it is contended that this is the production or the gathering of raw gas and is not gas which flows in interstate commerce. The third

type is sold under specific contract to another, and in that specific contract there is the direct requirement that raw gas shall be processed and dry gas shall then flow from the one who purchases in interstate commerce.

If this were a matter of first impression on whether pipelines wholly within a state touching and being attached to other interstate pipelines are subject to interstate commerce regulation, it might raise a serious question. However, with the length and breadth of recent opinions coming from the Supreme Court, it has the general appearance of being in the flow of interstate commerce in natural gas.

Another striking thing about this case is that the Gulf Oil Corporation receives raw gas in the great State of Texas, famous for its size and expansion but having only a few large cities and relatively little manufacturing. One can almost perceive that while Texas has been blessed by nature, the use of its gas is naturally going to flow to the more populous centers of our country and to those great industrial centers in the workshop of America. I point to that because the Court does not feel that the first contention of whether this is intra or interstate is a serious one.

On the other hand, the defendant argues that this Court is ousted of jurisdiction because this is an administrative proceeding and that the federal courts will not give advisory opinions, that is, will not assume jurisdiction unless there is a justifiable claim or controversy. There is merit to that argument. However, this Court is firmly convinced by the holding of

Ex parte Young, cited at 209 U. S. 123, that where, as here, there is a serious contention made that a company may be in violation of both state and federal regulations in addition to being confronted by a very serious penalty of heavy daily charge, that it does have a justifiable issue against a possibility that administrative authorities will so delay the determination of an issue as to practically oust such companies from their remedies in federal courts.

It has been urged by the defendant that the only appeal from administrative proceedings of the Federal Power Commission lies by direct appeal to the United States Circuit Court of Appeals for the District of Columbia Circuit. That is true, of course, if there is a genuine adversary proceeding. But here the record shows that the Federal Power Commission, confronted with this very drastic, far-reaching opinion of the Phillips Petroleum case issuing out of the Supreme Court on June 7, 1954, had to act with drastic speed, and commendably did so by issuing Order 174. It invited and received opposition, or points and authorities in opposition, to its projected control. On the strength of the briefs received and arguments heard, it promulgated Order 174-A, and then, after argument and further briefs, it issued the modified Order 174-B.

One of the foremost things in this case is that the very points which plaintiff now argues are before the Federal Power Commission for administrative determination. Accordingly, the Court is going to rule, first, that in a proper case where irreparable damage is shown, a federal court is not ousted of jurisdiction

to enjoin the improper, capricious and arbitrary action of an administrative hearing. The Court also holds, as a matter of fact and law, that there is pending before the Federal Power Commission a case which will be determinative of the very issues involved here, and that that case has not been finally adjudicated. In a broad sense the administrative remedies of the plaintiff have not been exhausted. And third, and foremost, the plaintiff has not shown by the four corners of this record and by the argument and by proffers of proof that there has been irreparable damage at the present time. Accordingly, the Court will deny the motion of plaintiff for a temporary injunction.

* * * * * *

REPORTER'S CERTIFICATE

Certified to be the official transcript of proceedings indicated in Gulf Oil Corporation v. Federal Power Commission, C. A. No. 515-55, Friday, February 18, 1955.

ROBERT I. THIEL,
Official Reporter.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 515-'55

Filed March 14, 1955, Harry M. Hull, Clerk.

GULF OIL CORPORATION AND
GULF REFINING COMPANY, *Plaintiffs*

vs.

THE FEDERAL POWER COMMISSION; HON. JEROME K. KUYKENDALL, Commissioner, Chairman; HON. CLAUDE L. DRAPER, Commissioner; HON. NELSON LEE SMITH, Commissioner; HON. SEABORN L. DIGBY, Commissioner; HON. FREDERICK STUECK, Commissioner, 441 G Street, N. W., Washington, D. C., *Defendants*

ORDER

This cause came on to be heard February 18, 1955 on Plaintiffs' motion for a preliminary injunction enjoining and restraining the Defendants from enforcing as to certain of Plaintiffs' sales of natural gas Federal Power Commission Order No. 174-B and the Natural Gas Act, and the Court having considered the verified complaint for declaratory judgment, injunction and equitable relief and the affidavit submitted in support of the aforesaid motion for preliminary injunction, makes the following

FINDINGS

1. The controversy in this case evolves around

the decision of the United States Supreme Court in *Phillips Petroleum Co. v. Wisconsin* 347 U. S. 672, decided June 7, 1954.

2. Subsequent to the decision of the United States Supreme Court in *Phillips Petroleum Co. v. Wisconsin* 347 U. S. 672, the Federal Power Commission on December 17, 1954 issued an order designated as Order No. 174-B (19 F. R. 8807, December 2, 1954).

3. Said Order No. 174-B embodies rules and regulations governing, among other things, the filing of rate schedules and applications for certificates of public convenience and necessity by so-called "independent producers" of natural gas which are also "natural-gas companies" as the latter term is defined in the Natural Gas Act.

4. Said Order No. 174-B was issued to all those "independent producers" who might be involved and brought within the jurisdiction of the Federal Power Commission under the decision of the United States Supreme Court in *Phillips Petroleum Co. v. Wisconsin* 347 U. S. 672.

5. Plaintiffs are engaged in the production of natural gas and the sale thereof in numerous States of the United States, and each sale is made in the State in which the gas is produced.

6. Plaintiffs, in several States, engage in the business of selling "residue" natural gas at the tailgate or outlet pipe of processing plants owned in whole or in part by them within the State of production for transportation and resale in

interstate commerce and concede that under the ruling in the *Phillips* case, *supra*, such sales are within the jurisdiction of the Federal Power Commission.

7. Plaintiffs in several States engage in the business of selling natural gas at the wellhead within the State of production under contracts which do not provide for the processing of such by the purchaser and where some or all such gas may ultimately be transported or resold in interstate commerce by the purchaser.

8. Plaintiffs, in several States, engage in the business of selling natural gas at the wellhead within the State of production under contracts which expressly provide for the processing of such gas by the purchaser and where some or all of such gas may ultimately be transported or resold in interstate commerce by the purchaser.

9. The issues raised by Plaintiffs before the Court with respect to the Federal Power Commission's jurisdiction over the sales of natural gas referred to in Findings 7 and 8 hereof are involved in a proceeding pending before the Commission to which Plaintiffs are not parties, and the decision therein may be determinative of the issues involved herein.

10. Federal Power Commission Order No. 174-B attempts to get some semblance of order and regulation whereby rates, control and supervision of all types of both wet and dry natural gas from sources of supply to ultimate use in interstate commerce might come under general

regulating authority of the Commission.

11. The administrative remedies of the Plaintiffs have not been exhausted.

12. Plaintiffs have not shown that there is irreparable damage at the present time.

CONCLUSIONS

1. Plaintiffs have not shown that they have been or will be irreparably damaged by Federal Power Commission Order No. 174-B.

2. Plaintiffs have not presented a proper case warranting the issuance of a preliminary injunction.

Wherefore, upon the foregoing considerations and findings and for the further reasons stated in the Court's ruling from the bench made on February 18, 1955, and the Court being sufficiently advised in the premises, it is

Ordered, that the Plaintiffs' motion for preliminary injunction be denied.

Entered at Washington, D. C., this 14th day of March, 1955.

(S) JAMES R. KIRKLAND
United States District Judge.

Approved as to form:
(S) MAC ASBILL,
Counsel for Plaintiffs.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12627

GULF OIL CORPORATION AND
GULF REFINING COMPANY, *Appellants*

v.

FEDERAL POWER COMMISSION,
HON. JEROME K. KUYKENDALL, CHAIRMAN,
et al., *Appellees*

Appeal from the United States District Court
for the District of Columbia

Decided January 30, 1956

Mr. Jesse P. Luton, Jr., of the bar of the Supreme Cour of Texas, *pro hac vice*, by special leave of Court, with whom *Mr. Burdette M. Asbill* was on the brief, for appellants.

Mr. Robert L. Russell, Attorney, Federal Power Commission, with whom *Messrs. Willard W. Gatchell*, General Counsel, Federal Power Commission, and *William J. Grove*, Assistant General Counsel, Federal Power Commission, were on the brief, for appellees.

Before WILBUR K. MILLER, WASHINGTON and BASTIAN, Circuit Judges.

BASTIAN, *Circuit Judge:* Due to the similarity of facts and identity of the legal principles involved in the instant case with those in Nos. 12583-84, Federal Power Commission v. Union Producing Company, decided this day, we affirm the order of the trial court with respect to the denial of the injunction and remand the case with directions to dismiss the complaint.

Affirmed, and remanded with directions to dismiss.

WILBUR K. MILLER, *Circuit Judge,* dissents.

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 12,583-4

FEDERAL POWER COMMISSION,
et al., Appellants

v.

UNION PRODUCING COMPANY, *Appellee*

Appeals from the United States District Court
for the District of Columbia

Decided January 30, 1956

Mr. William J. Grove, Assistant General Counsel, Federal Power Commission, with whom *Messrs. Willard W. Gatchell*, General Counsel, Federal Power Commission, and *Robert L. Russell*, Attorney, Federal Power Commission, were on the brief, for appellants.

Mr. Thomas Fletcher, of the bar of the Supreme Court of Texas, *pro hac vice*, by special leave of Court, with whom *Messrs. C. Huffman Lewis and Morton E. Yohalem* were on the brief, for appellee.

Before WILBUR K. MILLER, WASHINGTON and BASTIAN, Circuit Judges.

BASTIAN, *Circuit Judge:* The defendants in the trial court were the Federal Power Commission and its members, to whom Congress has delegated the administration of the Natural Gas Act. 52 Stat. 821, 15 U.S.C. § 717.

In its complaint in the trial court Union Producing Company, engaged in the production and gathering of oil and natural gas, claims that the Natural Gas Act is inapplicable to its wellhead sales of natural gas and sales of natural gas for processing, and seeks to enjoin the enforcement of certain regulations promulgated by the defendant Commission and now designated as Order 174-B,[1] requiring the filing of rate schedules and applications for certificates of public convenience and necessity. The company alleges that this order results in an arbitrary and unreasonable interference with its existing contractual relationships, and impairs the obligation of contracts in violation of the Constitution, depriving the company of due process of law in violation of the Fifth Amendment and contrary to the provisions of the Administrative Procedure Act.

More specifically, the company alleges that it presently has a large number of sales contracts involving a substantial dollar aggregate and, as a producer, is constantly bringing in new fields and wells which, in turn, involve new sales of gas produced. The company

[1] Order No. 174-B is entitled "Order amending Order Prescribing Regulations Governing the Filing of Rate Schedules and Applications for Certificates of Public Convenience and Necessity by Producers and Gatherers of Natural Gas Which Are Also Natural Gas Companies, Waiving Accounting Requirements, and Relating to Automatic Escalation and Favored Nation Clauses in Contracts for the Sale of Natural Gas by Such Producers and Gatherers."

also alleges that under compulsion of Order 174-B it is subjected to loss of customers and other economic sanctions already incurred and threatening to arise in greater measure from prospective customers declining to deal with it; that it faces the problem of third party contractors refusing to pay the increased prices called for by contract and refusing to make reimbursement of taxes advanced by the company under contract and from the loss of benefit of escalation provisions in existing contracts, as well as the threatened inability to dispose of future supplies of natural gas produced by it. Furthermore, the company states that failure to comply with the newly promulgated regulations of the Commission will subject it unduly to the risk and threat of severe fines and penalties provided by the Natural Gas Act.

The entire controversy in these cases revolves around the decision of the Supreme Court in *Phillips Petroleum Co. v. State of Wisconsin*, 347 U.S. 672 (1954), affirming the decision of this court in *State of Wisconsin v. Federal Power Commission*, 92 U.S. App.D.C. 284, 205 F.2d 706, which reversed the decision of the Federal Power Commission In the Matter of *Phillips Petroleum Co.*, 10 F.P.C. 246, 90 P.U.R. (N.S.) 325 (1951). The series of orders designated as Order Nos. 174, 174-A and 174-B stem directly from the decision in the *Phillips* case, *supra*, and were promulgated by the Commission to adapt the Commission's rules and regulations to that decision. Following the decision of the Supreme Court on June 7, 1954, the Commission, on July 16, 1954, issued Order

No. 174[2] prescribing procedural rules of general applicability to those persons, "independent producers and gatherers," determined by that decision to be within the purview of the Natural Gas Act and subject to the jurisdiction of the Commission. The rules and regulations comprising the series of 174-Orders amend the Commission's rules and regulations and provide means by which a "natural gas company" in the producing and gathering area of the business, as contrasted to an interstate pipeline "natural gas company," could comply with the requirements of the Natural Gas Act.

The provisions of the Natural Gas Act, which the 174-Orders were designed to implement, are embodied in Sections 4, 7 and 8 of the Act. Section 4(c) requires every natural gas company to file with the Commission schedules of its rates and charges in such form as the Commission may designate and prescribe in its regulations. Section 4(d) prohibits changes in rates except after 30 days' notice to the Commission and the public. Section 7(b) forbids the abandonment of facilities or service without the permission and approval of the Commission first being obtained. Section 7(c) prohibits engagement in operations subject to the Commission's jurisdiction unless a certificate of public convenience and necessity has been obtained from the Commission. Section 7(d) requires that applications for certificates be filed in such form, and notice thereof given, as the Commission may require. Section 8(a) authorizes the Commission to prescribe

[2] Order No. 174, 19 F.R. 4534, July 2, 1954, was superseded by Order No. 174-A, 19 F.R. 5081, August 12, 1954, which was later amended and restated as Order No. 174-B, 19 F.R. 8807, December 23, 1954.

a system of accounts and classification of companies, and requires every natural gas company to conform its accounts thereto. Section 16 of the Act authorizes the Commission to prescribe such orders, rules and regulations as it finds necessary to carry out the provisions of the Natural Gas Act.

Order 174-B now embodies the effective rules and regulations applicable to rates and certificate application filings by "independent producers." Throughout the 174 series of orders the definition of "independent producers" has remained unchanged. Each order, in succession, has been made applicable to the operations and transactions conducted by an "independent producer" as of June 7, 1954, the date of the Supreme Court decision in the *Phillips* case, and each order required rate and certificate application filings to be made with the Commission not later than December 1, 1954.

The company points out that, except for a few isolated instances of state-controlled unitization, it sells natural gas at the wellhead or at the downstream side of a separator located adjacent to the wellhead; that it does not gather such gas but, rather, that the gathering is done by those who purchase from the company; that the company does not own any processing plants through which the gas may be processed or from which gas is sold by it, nor does it purchase natural gas from any other producer for resale or processing. Furthermore, the company alleges that it does not engage in interstate transportation of natural gas; that title to the gas passes at the point of delivery; that it has no control over the gas after

delivery; and that it does not know what disposition is made by the purchaser after delivery. The company contends that since all its sales are made in the course of production and prior to gathering by third parties, it is not a natural gas company as defined in the Natural Gas Act.

The trial judge found in favor of the company, concluding that the suits might be maintained, granted a preliminary injunction, and denied the motion of the Government to dismiss. The court held in these cases that the remedy of injunction is available to the plaintiff company under the Administrative Procedure Act.

It appears from a reading of the record that a number of "gas-gathering" companies, uncertain as to their status under the new regulations, Orders 174, 174-A and 174-B, have taken advantage of the Commission's Rule, Section 1.7(c),[3] and have filed petitions for a declaratory order to have their status determined.

The statutory scheme in a judicial review of the Federal Power Commission action contemplates an initial decision by the agency, followed by court review. Reasons of uniformity of decision, based on the expertise of a specialized agency, underlie this scheme.

[3] Section 1.7(c) provides: "[Petitions] *For declaratory orders.* Petitions for the issuance in the discretion of the Commission, of a declaratory order to terminate a controversy or remove uncertainty, shall state clearly and concisely the controversy or uncertainty which is the subject of the petition, shall cite the statutory provision or other authority involved, shall include a complete statement of the facts and grounds prompting the petition, together with a full disclosure of petitioner's interest, and shall conform to the requirements of §§ 1.15 and 1.16." 18 CFR 1.7(c).)

The company relies on *Columbia Broadcasting System v. United States*, 316 U.S. 407. However, this case did not involve the question of CBS' status. That was already clear. The relief asked by CBS was not the securing of a determination as to whether or not certain transactions (and CBS as a participant) were within the terms of the Federal Communications Commission regulations. CBS wanted a court ruling that the regulations in their entirety were outside the agency's statutory authority. The Supreme Court determined (1) that it was considering an "order" in that the rules and regulations in question impaired existing contracts and obligations, and (2) that these rules and regulations operated to control in advance the rights not only of licensees but also of others, the broadcasting networks. The only action remaining in the CBS case was the enforcement by the Commission of the regulations against a station licensee.

In the instant case, however, it seems to us that the real request of the company is to have particular transactions classified as outside the Act and the regulations. This cannot be done until the agency has passed on the question. *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938).[4] Where means are provided for obtaining administrative determination as to whether the plaintiff companies are subject to rules and regulations of the Commission, those means must be resorted to prior to judicial review. Certainly, we cannot assume that an exercise of those means would be a useless task, for that assumption would necessarily be pitched on a presumption that the Commis-

[4] Cf. *Aircraft & Diesel Corp. v. Hirsch*, 331 U.S. 752 (1946).

sion is derelict in its duties under the Constitution and the Natural Gas Act.

The company has not exhausted its administrative remedy. Its petitions before the Commission were chiefly directed to the order as a whole. It could not properly raise the question whether the order would apply to particular situations, except perhaps to show a need for clarification. The Commission took the view that such questions must wait. This was a reasonable attitude. A petition for declaratory ruling from the Commission (under Section 1.7(c) of the Rules) would seem to be the appropriate remedy. Union did not ask for this.

The company claims that its status has been erroneously predetermined. We think there is no showing that this is so. In any event, *Eccles v. Peoples Bank*, 333 U.S. 426, 434 (1947), points out that:

> "Where administrative intention is expressed but has not yet come to fruition (*Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 324), or where that intention is unknown (*Great Atlantic & Pacific Tea Co. v. Grosjean*, 301 U.S. 412, 429-30), we have held that the controversy is not yet ripe for equitable intervention."

As we hold that the suit must fail because the administrative remedies have not been exhausted and as the District Court thereby lacked jurisdiction over the subject matter, it is not necessary under the circumstances of this case that we pass on the claim of "irreparable injury."

In view of the foregoing we must reverse and remand the case with directions to vacate the preliminary injunction and to dismiss the complaint.

Reversed and remanded.

WILBUR K. MILLER, *Circuit Judge*, dissents.

District of Columbia Circuit
APR 20 1955
APR 7 1955
HAROLD B. WILLEY, CLERK

JOINT APPENDIX

Joseph W. Stewart
CLERK

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12,627

GULF OIL CORPORATION AND GULF REFINING COMPANY,

Appellants,

v.

FEDERAL POWER COMMISSION ET AL.,

Appellees

Appeal from Order of the District Court of the District of Columbia Circuit Denying Motion of Appellants for a Preliminary Injunction

JESSE P. LUTON, JR.,
P. O. Drawer 1290,
Fort Worth, Texas,
BURDETTE M. ASBILL,
Ring Building,
18th and M Streets, N. W.,
Washington, D. C.,
Attorneys for Appellants, Gulf Oil Corporation and Gulf Refining Company.

WILLARD W. GATCHELL,
General Counsel,
Federal Power Commission,
441 G Street, N. W.,
Washington, D. C.,
Attorney for Appellees.

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IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12,627

GULF OIL CORPORATION AND GULF REFINING COMPANY,

Appellants,

v.

FEDERAL POWER COMMISSION ET AL.,

Appellees

Appeal from Order of the District Court of the District of Columbia Circuit Denying Motion of Appellants for a Preliminary Injunction

JOINT APPENDIX

1 IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 515-55

Filed February 4, 1955. Harry M. Hull, Clerk

GULF OIL CORPORATION and GULF REFINING COMPANY, Gulf Building, Pittsburgh 30, Pennsylvania, *Plaintiffs,*

v.

FEDERAL POWER COMMISSION; HON. JEROME K. KUYKENDALL, Chairman; HON. CLAUDE L. DRAPER, HON. NELSON LEE SMITH, HON. SEABORN L. DIGBY, and HON. FREDERICK STUECK, Commissioners, 441 G Street, N. W., Washington 25, D. C., *Defendants*

COMPLAINT FOR DECLARATORY JUDGMENT, INJUNCTION AND EQUITABLE RELIEF

Gulf Oil Corporation and Gulf Refining Company, Gulf Building, Pittsburgh 30, Pennsylvania, plaintiffs, bring this

their complaint against the Federal Power Commission and the individual members thereof, Hon. Jerome K. Kuykendall, Chairman, Hon. Claude L. Draper, Hon. Nelson Lee Smith, Hon. Seaborn L. Digby, and Hon. Frederick Stueck, Commissioners, 441 G Street, Washington 25, D. C., and respectfully show:

1

Plaintiff Gulf Oil Corporation is a corporation incorporated under the laws of the State of Pennsylvania, with its principal office and place of business in Pittsburgh, Allegheny County, Pennsylvania. Plaintiff Gulf Refining Company is a corporation incorporated under the laws of the State of Delaware, with its principal office and place of business in Pittsburgh, Allegheny County, Pennsylvania.

2

The above-named individual defendants are, and at all times pertinent hereto have been, the members composing the Federal Power Commission, a commission created and established by Section 1 of the Federal Power Act, 1920 (41 Stat. 1063, 16 U. S. C. 792), as amended June 23, 1930, c. 572, Sec. 1, 46 Stat. 797; October 15, 1949, c. 695, Sec. 5(a), 63 Stat. 880; 1950 Reorg. Plan No. 9, Sec. 3, eff. May 24, 1950, 15 F. R. 3175, 64 Stat. 1265. The individual defendants are official residents of the City of Washington, District of Columbia, where service may be had upon them.

3

The jurisdiction of this Court is invoked under the provisions of 28 U. S. C. 2201 (Act of June 25, 1948, c. 646, 62 Stat. 964, as amended May 24, 1949, c. 139, Sec. 111, 63 Stat. 105), 28 U. S. C. 2202 (Act of June 25, 1948, c. 646, 62 Stat. 964), 5 U. S. C. 1009 (Act of June 11, 1946, c. 324, Sec. 10, 60 Stat. 243), 15 U. S. C. 717u (Act of June 21, 1938, c. 556, Sec. 22, 52 Stat. 833), and 28 U. S. C. 1331 (Act of June 25, 1948, c. 646, 62 Stat. 930). The amount in controversy exceeds the sum of Three Thousand Dollars ($3,000), exclusive of interest and costs.

4

Plaintiff Gulf Oil Corporation is engaged in the business of producing oil and natural gas in the states of Florida,

New Mexico, Oklahoma, Kansas, Nebraska, Utah, Montana, Wyoming, Texas and West Virginia. Plaintiff Gulf Refining Company is engaged in the business of producing oil and natural gas in the states of Alabama, Arkansas, Louisiana, Mississippi, Illinois, Indiana, Kentucky, Michigan, and Utah. The Commission is an agency of the United States to which Congress has delegated the administration of the Natural Gas Act, as therein provided.

5

On July 16, 1954, the Federal Power Commission issued Order No. 174 in its Docket No. R-138, styled "In the Matter of Compliance by Natural-Gas Producers and Gatherers With Certificate and Rate Requirements," which order was further styled "Regulations Governing
3 the Filing of Rate Schedules and Applications for Certificates of Public Convenience and Necessity by Producers and Gatherers of Natural Gas Which Are Also Natural Gas Companies, and Waiver of Accounting Requirements." Said Order was issued without prior notice of any character to plaintiffs or to any other person and without any prior hearing. On August 6, 1954, the Commission, also without prior notice or hearing, issued Order No. 174-A in said Docket No. R-138, which Order was recited as rescinding and superseding Order No. 174.

By said Orders No. 174 and No. 174-A, purportedly issued by the Commission under the authority of the Natural Gas Act, the Commission "amended Part 154—Rate Schedules and Tariffs, and Part 157—Applications for Certificates of Public Convenience and Necessity, Subchapter E—Regulations under the Natural Gas Act, Chapter I, Title 18, Code of Federal Regulations, by prescribing regulations governing the filing of rate schedules and applications for certificates of public convenience and necessity by persons engaged in the production and gathering of natural gas and held by the Supreme Court to be subject to all the requirements of the Natural Gas Act in *Phillips Petroleum Company v. Wisconsin et al.*, 347 U. S. 672." Both of said Orders purport to regulate "independent producers," defined therein as "any person as defined in the Natural Gas Act who is engaged in the production or gathering of

natural gas and who transports natural gas in interstate commerce or sells natural gas in interstate commerce for resale, but who is not primarily engaged in the operation of an interstate pipeline."

6

On August 6, 1954, plaintiffs, after having received a copy of Order No. 174-A, accompanied by a covering letter signed by the Secretary of the Commission, dated August 6, 1954, addressed to "Producers and Gatherers of Natural Gas," filed an application for rehearing, pursuant to Section 19(a) of the Natural Gas Act (15 U. S. C. 717R(a)). In such application plaintiffs stated, among other things, that they

4 are engaged in the business of producing and gathering natural gas as an incident to their primary business of producing and transporting, refining and marketing crude oil, that each is an "independent producer" within the meaning of that term as defined in Section 154.91 of Order No. 174-A, and that as an "independent producer" against which class of persons said Order was applied and directed are aggrieved and injured by the issuance of said Order. It was further stated in the application for rehearing that plaintiffs do not own or operate an interstate gas transmission line or transport any gas in interstate commerce and do not control or own any interest in any company conducting such operations; that the natural gas sold by plaintiffs is always sold in the same state in which it is produced; and that the only facilities owned or operated by these plaintiffs through which or by which any natural gas is transported and sold by them are facilities which are a part of their producing and gathering operations and that they own no facilities which are subject to the jurisdiction of the Federal Power Commission. It was further alleged in the application for rehearing that Order No. 174-A was invalid in fixing rates retroactively and reducing prices of producers which had increased between June 7, 1954, and the date of the issuance of Order 174-A without a prior hearing. It was further alleged that in these respects the Order had the effect of nullifying and abrogating the existing contractual relationships of plaintiffs to their irreparable injury and impaired the obligations

of contracts in violation of the Constitution of the United States, deprived plaintiffs of due process of law in violation of the Fifth Amendment of the Constitution of the United States and was contrary to the provisions of the Administrative Procedure Act. Further allegations in the application for rehearing were that the Commission had exceeded its authority under the Natural Gas Act in said Order by prescribing the amounts of the rates and charges to be contained in original rate schedules filed by "independent producers"; that the order would require the filing of rate schedules in cases where producers had ceased selling gas in interstate commerce prior to October 1, 1954, the date prescribed in said Order No. 174-A for filing applications for certificates of public convenience and necessity and rate schedules; that said Order nullified price adjustment clauses in the contracts of producers made prior to the date of its issuance; that the Order unlawfully prohibited the abandonment of any "sale" or "service" being rendered on or since June 7, 1954, without the permission and approval of the Commission; that said Order purports unlawfully to regulate the physical production of oil and gas by requiring producers to continue the sale of gas in interstate commerce in the same quantities that were being sold on June 7, 1954, thereby interfering with the conservation powers reserved to the states under the Tenth Amendment and preserved under the Natural Gas Act by the producing and gathering exemption; and that said Order was invalid in requiring producers to file for certificates of public convenience and necessity where they were selling natural gas in interstate commerce for resale on June 7, 1954, thereby denying them the right to terminate such sales to prevent being subject to the jurisdiction of the Commission.

7

On September 8, 1954, the Commission issued an order in Docket No. R-138 granting oral argument on the applications for rehearing which had been filed by plaintiffs and others and setting such arguments for September 22, 1954. In this order the Commission also denied all requests for

stay of Order No. 174-A. Plaintiffs, through their attorneys and without waiving their right to thereafter contest the validity of Order No. 174-A in subsequent court proceedings and without submitting themselves to the jurisdiction of the Commission, filed a brief and participated in the oral arguments before the Commission, held on September 22 and 23, 1954.

8

On September 24, 1954, the Commission issued a further order in Docket No. R-138 modifying in part Order No. 174-A and extending the deadline for filing certificates of public convenience and necessity and rate schedules from October 1, 1954 to December 1, 1954. In this modification order the Commission recited that "Rehearing on this order [No. 174-A] was granted by order issued September 8, 1954, for the purpose of receiving briefs and arguments in order that the Commission might determine whether to revoke or rescind Order No. 174-A or to modify that order in any respect." The Commission stated further that "The other points and issues raised in the petitions for rehearing will be decided as quickly as possible and appropriate announcement made."

9

The Commission took no further action with respect to the applications for rehearing prior to December 1, 1954, the date set by the Commission for filing applications for public convenience and necessity and rate schedules under Order No. 174-A, and it was not until December 17, 1954, that the Commission issued an order denying these applications for rehearing, except insofar as such applications may have been granted by this order, which was designated Order No. 174-B.

10

Order No. 174-B was entered by the Commission in Dockets No. R-138 and No. R-137, styled respectively "In the Matters of Compliance by natural-gas producers and gatherers with certificate and rate requirements" and "Consideration of the desirability of rules concerning

automatic escalation and favored nation clauses in contracts by interstate natural-gas companies with producing companies." The Order was styled "Order amending Order Prescribing Regulations Government the Filing of Rate Schedules and Applications for Certificates of Public Convenience and Necessity by Producers and Gatherers of Natural Gas Which Are Also Natural Gas Companies, Waiving Accounting Requirements, and Relating to Automatic Escalation and Favored Nation Clauses in Contracts for the Sale of Natural Gas by Such Producers and Gatherers." Order No. 174-B contains the same definition of "independent producer" as was contained in
7 Order No. 174 and Order No. 174-A. Except as hereinafter discussed, Order No. 174-B contains revisions of Order No. 174-A which are immaterial to the issues in this suit.

11

Some gas produced and sold by plaintiffs is consumed in the state in which it is produced and is not involved in this action. Sales of natural gas by plaintiffs were some or all of such gas ultimately moves across a state line may be divided generally into the following categories:

(a) Sales of residue gas made at the tail-gate or outlet pipe of gasoline plants owned in whole or in part by plaintiffs. This is the type of sale which was involved in the *Phillips* case and held by the Supreme Court to be subject to the Natural Gas Act.

(b) Sales of gas well gas or of casinghead gas (gas associated with oil and produced from oil wells) which is not to be processed. Such sales are made at the wellhead or at the downstream side of a separator located adjacent to or near the wellhead, or prior to the completion of gathering. In most sales of this type, plaintiffs do not do any gathering of the gas, this being done by those who purchase the gas from plaintiffs, and in all such cases gathering is completed by the purchaser. The contracts covering this type of sale provide for the passing of title to the purchaser at the point of delivery, with the result that plaintiffs have no control

over the gas after the delivery and in many cases do not and cannot know what disposition is made by the respective purchasers of such gas sold by plaintiffs. Such sales may be made either directly to an interstate pipeline company or to one who subsequently sells to an interstate pipeline company.

(c) Sales of gas well gas or of casinghead gas which is to be processed. Such sales are made at the wellhead, at the downstream side of a separator
8 located adjacent to or near the wellhead, or prior to processing. These sales are made under contracts which provide for the processing of the gas by the purchaser, which in some instances is an interstate pipeline company and in other instances is one who subsequently sells residue gas to an interstate pipeline company. These sales may be broken down further into two categories:

(i) Those in which plaintiffs receive a specified price per MCF for the residue or raw gas, which may or may not include provision for separate payments for liquids; and

(ii) Those in which plaintiffs receive a certain percentage of the proceeds received by the plant owner upon sale of the residue gas remaining after processing; the contracts normally provide for separate payment for liquids extracted in the gasoline plant.

Each of plaintiffs' contracts covering sales of this type provides for the passing of title to the purchaser at the point of delivery, and plaintiffs thereafter have no control over the disposition of the residue gas sold or used by the purchaser and usually do not know what disposition is made by the respective purchasers of such gas.

12

On November 30, 1954, plaintiffs found themselves in the position of having filed with the Commission an application for rehearing which had not been acted upon and faced with the deadline of December 1, 1954, for filing their appli-

cations for certificates of public convenience and necessity and rate schedules as directed in Order No. 174-A. From an examination of their various gas sale contracts, plaintiffs' attorneys had concluded that only those contracts described in category (a) in paragraph 11 above had been held by the Supreme Court in *Phillips Petroleum Company v. Wisconsin* to be subject to the Natural Gas Act, this being the only type of sale before the Court in that case. Plaintiffs' attorneys further concluded that the types of gas sale contracts described in categories (b) and (c) in Paragraph 11 above came within the production and gathering exemption in the sense that those terms are used in Section 1(b) of the Natural Gas Act. This latter conclusion was based upon the holdings of the Supreme Court of the United States in cases prior to the Phillips case, which cases were not overruled but were given effect in the Phillips decision. Acting upon the advice of their attorneys, plaintiffs filed on November 30 and December 1, 1954, applications for certificates of public convenience and necessity and rate schedules for those contracts described in category (a) in Paragraph 11 above.

Although plaintiffs and others who had petitioned the Commission for rehearing of Order No. 174-A had requested the Commission to define with particularity the categories of sales within its jurisdiction, and although the Commission in its Order of September 24, 1954, had stated that such petitions for rehearing would be decided as quickly as possible, no further Order was issued by the Commission prior to the December 1, 1954, deadline. Therefore, with respect to the sales described in category (b) of paragraph 11 hereof, which may conveniently be characterized "wellhead sales," plaintiffs were advised by their attorneys immediately before the December 1, 1954, deadline that in their opinion such wellhead sales were not subject to the jurisdiction of the Commission under the Natural Gas Act as construed in the *Phillips* case. However, the Commission had actually issued certificates of public convenience and necessity to producers covering sales of this type, thereby asserting jurisdiction over them and plaintiffs, therefore, concluded that they were com-

pelled by the risk of imposition of onerous penalties to file their contracts covering wellhead sales. With respect to sales described in category (c) of paragraph 11 hereof, which may be characterized "sales for processing," plaintiffs attorneys advised that in their opinion such sales were not subject to the jurisdiction of the Commission under the Natural Gas Act as construed in the *Phillips* case. The Commission, at least in one instance, had issued a certificate of public convenience and necessity to a plant owner without requiring filings by producers supplying gas to such plant, thereby indicating the Commission's lack of jurisdiction over such producers. Plaintiffs concluded, therefore, not to file contracts covering sales for processing.

Each of the applications for certificates of public convenience and necessity filed by plaintiffs contained the following reservation of rights in paragraph 6 thereof:

> "Applicant expressly reserves all of its rights and remedies, legal, equitable and administrative, including its Motion for Rehearing of Order 174-A filed with this Commission on August 16, 1954, to question, contest or oppose in any manner (i) the jurisdiction of the Commission over this Applicant, its properties and operations, including the sale of natural gas herein set out and any other sales which Applicant may make, and (ii) the validity and reasonableness of Order 174-A entered by this Commission in Docket No. R-138 under the Constitution and statutes of the United States, both in general and as applied to the specific sale herein described; and neither this application nor the sale of gas following the issuance of a certificate pursuant hereto shall estop, impair, or prejudice the right of Applicant to pursue or assert any such rights or remedies, or be construed or treated as a waiver or admission of the Commission's jurisdiction over Applicant or of the validity or reasonableness of its said Order."

13

In paragraph 6 of Order No. 174-B, issued after the filings described in paragraph 12 above had been made by plaintiffs, the Commission stated:

"It was also urged that the Commission limit the applicability of the Act to those operators selling gas in interstate commerce after processing or gathering and acting for other working interests. The rules are here revised by the addition of a paragraph in Section 154.91 under which operators may file in those situations where the purposes of the statute as to certificate requirements and rate fixing may be made fully effective without calling for separate filings by those having working interests, although such interests may also file if they care to do so. It is expected that by this paragraph a large number of parties having working interests may be relieved of the filing requirements, although, of course, they are not and cannot be exempted from the statute, if, by reason of their activities, they come within its terms."

Section 154.91(b) of Order No. 174-B, referred to in the above quoted paragraph 6 thereof, provides:

"(b) The filings with regard to all sales required under § 154.92, § 154.94 and § 157.23 may
11 be made by (1) an operator of one or more wells under co-ownership, (2) an operator where a group of producers are unitized for production and sale, or (3) an operator of a plant processing natural gas and located in the producing area of the gas which it processes and the payments by such operator to the producers represent a percentage of the proceeds of the sale thereof by the operator. Where filings are made by an operator under this paragraph, the parties to the operating arrangement, and those producers who sell to the processing plant described in clause (3) herein, need not file hereunder. When a filing is made by an operator under clauses (1) or (2) herein, he shall submit therewith (i) a list of all persons having working interests involved in the sale of natural gas covered by his filing, (ii) a list of the parties to the operating arrangement, and (iii) a statement of their percentage of their interests. When a filing is made under clause (3) herein, the operator shall file a list of the producers from whom the natural gas is purchased, showing the

percentage received by each from the sales. The operator filing hereunder shall submit every twelve months thereafter a statement showing any changes in the several respects since the list was previously submitted."

The above section thus authorizes the operator of the processing plant to file for the producer selling gas to such plant where "the payments by such operator to the producers represent a percentage of the proceeds of the sale thereof by the operator." If the operator makes this filing, this section further provides that the producers who sell to the processing plant need not file. It follows from this that if the plant owner does not file for the producers as permitted under this section, the producers themselves must file their contracts covering sales of this type. It is also to be implied from the provisions of this section, that producers who sell gas to processing plants and receive a specified price per M. C. F. for the residue gas must file their contracts covering sales of this type. Such assertion of jurisdiction by the Commission by Order No. 174-B over sales of natural gas which are not subject to the Natural Gas Act is as to plaintiffs illegal, wrongful, arbitrary, confiscatory, void, and unconstitutional in that it exceeds the authority of the Federal Power Commission under the Natural Gas Act, amounts to an adjudication without a hearing as required by the Administrative Procedure Act, and deprives plaintiffs of their property without due process of law in violation of the Fifth Amendment of the Constitution of the United States.

12 14

The Commission also has asserted, and is asserting, jurisdiction over wellhead sales, the type of sale described in category (b) of paragraph 11 above, by its application of Order No. 174-B to all "independent producers," by the sweeping definition of the term "independent producer" contained in Order No. 174-B, and by consistently applying Order No. 174-B to wellhead sales in issuing certificates, accepting the filing of rate schedules and suspending and granting changes in rates.

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15

Many of the contracts of plaintiffs in each of the categories enumerated in paragraph 11 hereof, which were in effect on June 7, 1954, provide for price adjustments, either periodically or based upon the occurrence of events specified in those contracts, and such provisions had not become operative on August 16, 1954, the date of the issuance of Order No. 174-A. By Section 154-94(c) of Order No. 174-B, the Commission wrongfully attempts to prohibit the operation of such price adjustment clauses and to deny to plaintiffs the right to receive the rates to which they are entitled under such contracts.

16

Plaintiffs show that Order No. 174-B is as to plaintiffs illegal, wrongful, arbitrary, discriminatory, confiscatory, void, and unconstitutional for the following additional reasons, to-wit:

(1) The Commission in the issuance and adoption of Order No. 174-B acted beyond the scope of its authority under the statutes by which it is governed, more particularly the Natural Gas Act and the Administrative Procedure Act.

(2) The Commission, under the guise of rule making, has issued orders adjudicating without hearing that various types of plaintiffs' gas-producing activities are subject to its jurisdiction, regardless of whether said gas production and sales thereof are of the character which were before the Supreme
13 Court in the *Phillips* case, thus depriving plaintiffs of the right to a hearing in violation of the Fifth Amendment to the Constitution of the United States.

(3) Order No. 174-B is invalid as a promulgation of a rule in that the requirements for rule making prescribed by the Administrative Procedure Act (5 U. S. C. 1003) were not complied with in the promulgation of said Order. The proposed regulations contained therein were not published in the Federal Register prior to the issuance of said Order, and although the

Order purports to set forth grounds as a basis for exceptions with respect to the giving of such notice, such grounds are as a matter of law insufficient.

(4) The only authority of the Commission to fix rates is after an appropriate proceeding and hearing pursuant to either Section 4(e) or Section 5(a) of the Natural Gas Act. Order No. 174-B fixes rates without such proceedings and hearings and thus is beyond the authority of the Commission under the Natural Gas Act and deprives plaintiffs of their property without due process of law in violation of the Fifth Amendment to the Constitution of the United States.

(5) Said Order requires plaintiffs to devote property to public use without adequate compensation in violation of the Fifth Amendment to the Constitution of the United States, and purports to subject plaintiffs to regulation as public utilities with respect to their gas-producing activities, notwithstanding that such activities and business are inherently of a non-public utility nature.

(6) Said Order exceeds the powers granted to the Commission by the Natural Gas Act in that it compels plaintiffs against their will to apply for certificates of public convenience and necessity though the Act does not so require or provide.

(7) Said Order unlawfully extends the coverage of the Natural Gas Act to activities of producers
14 and gatherers expressly exempted under the terms of that Act.

(8) By fixing or freezing rates retroactively to June 7, 1954, said Order fixes the rates and prices which plaintiffs may initially charge, contrary to the provisions of Section 4(c) of the Natural Gas Act governing original filing.

(9) Said Order fixes rates retroactively to June 7, 1954, at which time some of the prices of plaintiffs were lower than the prices in existence at the time of the issuance of said Order, thereby unlawfully reducing plaintiffs' rates without complying with the

requisite proceeding provided in Section 5(a) of the Natural Gas Act.

(10) Under Section 4(e) of the Natural Gas Act, one subject to the jurisdiction of the Act has the right to determine what his initial rate shall be, which initial rate in the case of plaintiffs consisted of their contracts in effect at the time of the issuance of Order No. 174-B. The only authority of the Commission under the Act to suspend rates is found in Section 4(e), which limits the power of suspension to changes of rates proposed by a natural gas company under Section 4(d) of the Act. The Commission by treating the operation of price adjustment clauses in plaintiffs' existing contracts as a change in rate and thus subject to suspension under Section 4(e) of the Act has thereby exceeded the authority granted it under the Act.

(11) Said Order fixes rates retroactively to June 7, 1954, without a hearing while the only authority of the Commission under the Natural Gas Act is to fix rates prospectively and then only after a proper hearing.

(12) Said Order as interpreted and applied by the Commission unlawfully extends the application of Sec. 7(b) of the Natural Gas Act, pertaining to abandonment of services, to the producing facilities and operations of plaintiffs.

(13) Said Order abrogates vested contractural rights of plaintiffs and has the effect of depriving plaintiffs of their property and property rights without due process of law and without compensating plaintiffs therefor.

17

Plaintiffs and their purchasers of natural gas are now subject to onerous penalties with respect to the sales described in category (c) of paragraph 11 hereof, which are made under contracts which plaintiffs have not filed with the Commission and over which the Commission is now asserting jurisdiction.

Under Section 21 of the Natural Gas Act these penalties are fines up to $500 a day for violating the Commission's Order No. 174-B and fines up to $5,000 and imprisonment up to two years for violating the Natural Gas Act. Section 7(c) of the Natural Gas Act makes unlawful all sales of natural gas subject to the jurisdiction of the Commission without the covering authority of a certificate of public convenience and necessity and, consequently, owners of processing plants will decline to purchase or receive gas for processing from any producer such as plaintiffs, irrespective of whether plaintiffs be a natural gas company with respect to sales of that type, for fear that such sale would be held illegal and unlawful because of the provisions of Order No. 174-B. With respect to all of the contracts described in paragraph 11, including those described in category (a) over which the Commission has jurisdiction under the *Phillips* case, plaintiff's prices or rates have been unlawfully frozen as of June 7, 1954, by Order No. 174-B. Plaintiffs are unlawfully prohibited by said Order from receiving the rates provided for in said contracts unless they apply to the Commission for approval of the increases in price to which they are entitled under the price adjustment clauses contained in such contracts and obtain such approval. In making such applications, the increased prices provided for in plaintiffs' contracts would be subject to unlawful suspension and denial by the Commission. Under Order No. 174-B, the purchasers from plaintiffs will, therefore, refuse to pay the increased
16 prices provided for in such contracts in accordance with the terms thereof because of the failure of the plaintiffs either to have a certificate of public convenience and necessity from the Commission or to have such prices approved by the Commission. With respect to any new sales of gas which plaintiffs may make hereafter and irrespective of whether such sales are rightfully within the jurisdiction of the Commission, the purchasers from plaintiffs will decline to purchase or receive such gas from plaintiffs without the covering authority of a certificate of public convenience and necessity for fear that such sale

would be held illegal and unlawful because of the provisions of Order No. 174-B. Plaintiffs are reluctant to commit any more gas to the jurisdiction of the Commission because they cannot be certain that the price at which they contract to sell such gas and upon which their planning and operations are based will be permitted by the Commission to remain in effect. Furthermore, the unlawful regulation by the Commission of such sales, and of the activities in connection therewith, will be extremely burdensome to plaintiffs and will subject them to conflicting regulation by the Commission and by state conservation authorities. Most of plaintiffs' sales for processing involve casinghead gas, i. e., gas associated and produced with oil from oil wells. Insofar as this production is concerned, plaintiffs are required to comply with the regulatory orders of the respective state conservation agencies concerning the rate of production and prohibitions against the flaring of gas and are subject to severe penalties for any violations thereof. The delays necessarily involved in obtaining from the Commission a certificate after the date when production is first obtained will result either in plaintiffs' being unable to dispose of their oil production or in plaintiffs' being required to flare quantities of casinghead gas, both of which will work to the irreparable injury of the plaintiffs. Also, at times plaintiffs find it necessary, or are required, to reinject casinghead gas into the ground for repressuring, pressure maintenance, or other operations designed to obtain the maximum ultimate recovery of oil from the reservoir. The necessary delay in giving notice to the Commission prior to terminating the sale of such gas, as required by Order No. 174-B, will prevent plaintiffs from conducting these operations in the expeditious and prudent manner which is required in order to avoid waste of valuable natural resources and ensuing irreparable loss. And, although neither the Act nor the Order itself would by their terms require plaintiffs to obtain the Commission's approval to abandon their sales, the Commission has wrongfully asserted such authority in cases presently pending before it, and such assertions

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will greatly lengthen the delays and increase the losses involved in these circumstances, and will subject plaintiffs to the possible withholding of approval during the entire period this action is being litigated. Likewise, plaintiffs may at times desire to convert the use of casinghead gas from the manufacture of natural gasoline to the manufacture of another product or products and the unlawful assertion by the Commission of authority to approve or disapprove would result in serious injury to plaintiffs.

18

For all of the foregoing reasons, it is obvious that plaintiffs will suffer grievous and irreparable loss, injury and damage unless defendants, their agents, servants, and employees be enjoined from attempting to enforce the provisions of Order No. 174-B and the Natural Gas Act against these plaintiffs and their purchasers of natural gas. Plaintiffs allege that they have no adequate remedy at law and that they are without recourse unless this Court will issue its writ of injunction permanently enjoining and prohibiting the defendants, their agents, servants and employees, either directly or indirectly, from in anywise seeking to enforce said Order No. 174-B and any rules or regulations issued thereunder against plaintiffs and from seeking to enforce the Natural Gas Act with respect to their sales enumerated in categories (b) and (c) of paragraph 11. Except this Court issue its restraining order as hereinafter prayed for, plaintiffs will be subjected to serious and grave penalties and to irreparable injury for
18 which they have no adequate remedy at law unless full compliance is made by them with Order No. 174-B, which as shown above cannot validly or reasonably be legally required. Plaintiffs say that upon hearing and notice said restraining order should be merged and extended into a temporary injunction to remain in effect until entry of final judgment in this cause on the merits so that the status quo might be preserved.

WHEREFORE, premises considered, plaintiffs pray that the defendants and each of them be cited in terms of law

to appear herein; that a restraining order be issued to the defendants, their agents, servants, and employees, enjoining them from enforcing or attempting to enforce in any manner, directly or indirectly, against plaintiffs, with respect to any of plaintiffs' sales of gas at the wellhead described in category (b) of paragraph 11 hereof for which plaintiffs do not obtain a certificate of public convenience and necessity and with respect to plaintiffs' sales of gas for processing described in category (c) of paragraph 11 hereof, said Order No. 174-B and the rules and regulations purported to be issued thereby and thereunder and the Natural Gas Act; that upon notice and hearing a temporary injunction pendente lite be issued herein enjoining defendants, their agents, servants, and employees, from enforcing or attempting to enforce in any manner, directly or indirectly, against plaintiffs, with respect to any of plaintiffs' sales of gas at the wellhead described in category (b) of paragraph 11 hereof for which plaintiffs do not obtain a certificate of public convenience and necessity and with respect to plaintiffs' sales of gas for processing described in category (c) of paragraph 11 hereof, said Order No. 174-B and the rules and regulations purported to be issued thereby and thereunder and the Natural Gas Act pending entry of final judgment on the merits herein; that upon final hearing hereof defendants, their agents, servants, and employees, be permanently enjoined from enforcing or attempting to enforce in any manner, directly or indirectly, against plaintiffs said Order No. 174-B and the rules and regulations purported to be issued thereby and thereunder, and with respect to plaintiffs' wellhead sales and sales for processing described in categories (b) and (c) in paragraph 11 hereof, from enforcing or attempting to enforce in any manner, directly or indirectly, against plaintiffs the Natural Gas Act; that said Order 174-B and the rules and regulations purported to be established, promulgated, and declared thereby be held, adjudged, and declared to be illegal, unenforceable, null and void in their entirety ab initio as to plaintiffs and that the same be set aside, cancelled, and held for nought;

and that the Natural Gas Act be held, adjudged, and declared to be inapplicable to plaintiffs' wellhead sales and sales for processing described in categories (b) and (c) in paragraph 11 hereof; and for all costs and such other and further relief, both general and special, at law and in equity, to which plaintiffs may be entitled.

(S.) ARCHIE P. GRAY,
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Pittsburgh, Pennsylvania,
(S.) STEWART W. MARK,
Post Office Box 661,
Tulsa, Oklahoma,
(S.) MERLE E. MINKS,
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(S.) JESSE P. LUTON, JR.,
Post Office Drawer 1290,
Fort Worth, Texas,
(S.) MAC ASBILL,
Ring Building,
18th and M. Streets, N. W.,
Washington, D. C.,
Attorneys for Plaintiffs Gulf Oil Corporation and Gulf Refining Company.

20 COMMONWEALTH OF PENNSYLVANIA,
County of Allegheny, ss.

Before me, the undersigned authority, on this day personally appeared Archie D. Gray who being by me first duly sworn states upon his oath that he is one of the attorneys of record for Gulf Oil Corporation and Gulf Refining Company, Plaintiffs in the above entitled and numbered cause, and that he is authorized to make this affidavit and that the facts alleged in the foregoing complaint are true.

(S.) ARCHIE D. GRAY.

Sworn to and subscribed before me the undersigned authority this 3rd day of February, 1955.

[SEAL.] (S.) DOROTHY M. HUGHES,
Notary Public in and for Allegheny County, Pa.

Dorothy M. Hughes, Notary Public, Gulf Building, Pittsburgh, Pa. My commission expires January 7, 1959.

21 IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 515-55

Filed February 4, 1955—Harry M. Hull, Clerk

GULF OIL CORPORATION and GULF REFINING COMPANY,
Plaintiffs,

v.

FEDERAL POWER COMMISSION; HONORABLE JEROME K. KUYKENDALL, Chairman, HONORABLE CLAUDE L. DRAPER, HONORABLE NELSON LEE SMITH, HONORABLE SEABORN L. DIGBY, and HONORABLE FREDERICK STUECK, Commissioners,
Defendants.

AFFIDAVIT OF R. C. FREDERICK

COMMONWEALTH OF PENNSYLVANIA,
County of Allegheny, ss.

R. C. FREDERICK, being first duly sworn, states as follows:

1. That he is employed by both Gulf Oil Corporation and Gulf Refining Company, plaintiffs in the above styled cause of action, that his duties are concerned with and he has knowledge of their natural gas operations described herein and makes this affidavit in support of plaintiffs' application for a temporary injunction in said cause.

2. Gulf Oil Corporation is a corporation incorporated under the laws of the State of Pennsylvania, with its principal office and place of business in Pittsburgh, Allegheny County, Pennsylvania, and Gulf Refining Company is a corporation incorporated under the laws of the State of Delaware with its principal office and place of business in Pittsburgh, Allegheny County, Pennsylvania, and is a wholly owned subsidiary of Gulf Oil Corporation.

3. Plaintiffs are engaged in the business of producing and gathering natural gas as an incident to their primary busi-

ness of producing, transporting, refining and marketing crude oil.

Gulf Oil Corporation is engaged in the business
22 of producing oil and natural gas in the States of Florida, New Mexico, Oklahoma, Kansas, Nebraska, Utah, Montana, Wyoming, Texas and West Virginia. Plaintiff Gulf Refining Company is engaged in the business of producing oil and natural gas in the States of Alabama, Arkansas, Louisiana, Mississippi, Illinois, Indiana, Kentucky, Michigan and Utah. Plaintiffs do not own or operate an interstate gas transmission line. Nor do plaintiffs, or either of them, control or own any interest in any company conducting such operations. Natural gas which plaintiffs produce is frequently used for the purposes of their production of oil or of operation of their producing facilities, but, when sold, is always sold by plaintiffs in the same state in which such gas was produced. None is sold or transported by them outside the state of the origin of the gas.

4. Some of the gas produced and sold by plaintiffs is consumed in the state in which it is produced.

The sales of natural gas by plaintiffs where some or all of such gas ultimately moves across a state line may be divided into the following general categories:

(A) Sales of residue gas made at the tailgate or outlet pipe of gasoline plants owned in whole or in part by plaintiffs. In such cases the gas moves in stages:

(1) From the reservoir into the well bore.

(2) Through tubing or casing in the well to the surface.

(3) Through the Christmas tree, chokes, valves and other equipment at the wellhead.

(4) Through flow lines to a separator (which performs the function of separating the gas from oil, condensate or some of the heavier hydrocarbon constituents).

(5) Through gathering lines to the gasoline
23 plant.

(6) Through the gasoline plant.

(7) Into the pipe lines of the purchaser of the residue gas. (The first entry into the facilities of such purchaser may be through its meter, but in some cases metering may be accomplished at a point downstream on the purchaser's line.)

Gasoline plants perform the functions of removing from the gas constituents which would adversely affect its marketability as fuel gas and of compressing the gas to pressures required for transportation. Removal of a portion of the liquefiable hydrocarbons may be required in order to avoid their condensation in the purchaser's pipe line. In most cases, however, removal of liquefiable hydrocarbons is also desirable for the purpose of obtaining revenue from the sale of such products. Removal of water vapor, carbon dioxide and sulphur compounds is generally performed only to make the gas marketable, but in some cases revenue is derived from the sale of sulphur. In some cases, compression and dehydration may be required at points before the gas enters the plant.

As to the gas which is originally produced by plaintiffs, the equipment and facilities through which the gas moves as above set forth are owned in whole or in part by plaintiffs up to the point at which the gas enters the pipe line of the purchaser of the gas.

As to gas which is not produced by plaintiffs, but is purchased from other producers, the equipment and facilities through which such gas moves as stated above, prior to the point at which it enters the pipe lines of the purchaser of the residue gas, are owned in whole or in part, either by plaintiffs or by the producers from whom they purchased and generally the ownership of plaintiffs commences with gathering lines into
24 which such producers deliver their gas.

Not all of the gas which enters a gasoline plant and from which liquids and impurities are extracted is sold as residue gas. In every case there are shrinkages and losses resulting from the processing of the gas, and some of the gas is consumed as fuel for the operation of the plant. Normally some of the gas is returned

to the leases for use as fuel in the operation of the leases. In some cases some of the residue is also returned to the leases for subsurface operations such as gas lift, repressuring or pressure maintenance operations.

The purchasers of the residue gas are interstate pipe line companies (in some cases there may be an intervening buyer who sells to the owner of the interstate pipe line), but some residue gas from the same plant may be sold to purely intrastate pipe lines.

(B) Sales of gas well gas or of casinghead gas which is not to be processed. In such cases the gas moves through some or all of the following stages:

(1) From the reservoir into the well bore.

(2) Through tubing or casing in the well to the surface.

(3) Through the Christmas tree, chokes, valves and other equipment at the wellhead.

(4) Through flow lines to a separator.

(5) Through gathering lines of the plaintiffs.

(6) Into meters of the purchaser which measure the volume of the gas.

(7) Through the gathering lines of the purchaser of the gas.

In some cases compression may be required for the gas to enter into the gathering lines of the purchaser.

The sales in this category are made at the well-
25 head or at the downstream side of a separator located adjacent to or near the wellhead, or prior to the completion of gathering. In most sales of this type plaintiffs do not do any gathering of the gas, this being done by those who purchase the gas from plaintiffs, and in all such cases gathering is completed by the purchaser.

The equipment and facilities mentioned above through which the gas produced by plaintiffs moves as above set forth are owned in whole or in part by plaintiffs, up to the point at which the gas enters the gathering lines of the purchaser of the gas.

The contracts covering this type of sale provide for the passing of title to the purchaser at the point of delivery with the result that plaintiffs have no control over the gas after the delivery and in many cases do not and cannot know what disposition is made by the respective purchasers of such gas sold by plaintiffs.

Such sales may be made either directly to an interstate pipe line company or to one who subsequently sells to an interstate pipe line company.

(C) Sales of gas well gas or of casinghead gas which is to be processed. In such cases the gas moves through some or all of the following stages:

(1) From the reservoir into the well bore.

(2) Through tubing or casing in the well to the surface.

(3) Through the Christmas tree, chokes, valves and other equipment at the wellhead.

(4) Through flow lines to a separator.

(5) Through gathering lines to the gasoline plant.

(6) Through the gasoline plant.

(7) Into the pipe lines of the interstate pipe line company.

The gasoline plants perform the purposes and functions stated in connection with the sales of gas herein
26 enumerated under paragraph (A).

These sales are generally made under contracts commonly called "casinghead gas contracts", which provide for the processing of the gas by the purchaser.

In most cases, the gas is sold and delivered by plaintiffs to the plant owner either at the wellhead or at the downstream side of a separator located adjacent to or near the wellhead and in such cases the plaintiffs own in whole or in part the equipment and facilities through which the gas moves to the point of delivery. In some cases, however, the plaintiffs may perform some gathering prior to the sale and delivery of gas to the plant owner and in those cases the plaintiffs normally own the equipment and facilities through which the gas moves prior to its delivery to the plant owner.

In nearly all of these cases, the gas is sold by plaintiffs to one who owns and operates the gasoline plant and who subsequently sells the residue gas to an interstate pipe line company. In a few instances, the interstate pipe line company owns and operates the gasoline plant and in some of these cases the provision for processing of the gas may be permissive rather than mandatory.

Sales in this category may be further broken down into two classifications: (i) those in which plaintiffs receive a specified price per MCF for the residue or raw gas, which may or may not include provision for separate payment for liquids, and (ii) those in which plaintiffs receive a certain percentage of the proceeds received by the plant owner upon sale of the residue gas remaining after processing; the gas sales contracts in these cases normally provide for separate payment for liquids extracted in the gasoline plant.

Each of plaintiffs' contracts covering sales of this
27 type provides for the passing of title to the purchaser at the point of delivery, and plaintiffs thereafter have no control over the disposition of the residue gas sold or used by the purchaser and usually do not know what disposition is made by the respective purchasers of such gas.

5. Deliveries of gas in the above mentioned categories are subject to and dependent upon the operation of some or all of the following factors:

(A) Restrictions upon the amount or rate of production of gas, or oil, imposed by state bodies regulating production for conservation purposes.

(B) Restrictions upon the amount or rate of production invoked for the purpose of conducting producing operations according to good oil field practices and to obtain the maximum ultimate recovery of oil or gas.

(C) Restrictions upon the amount or rate of production invoked in the interest of operating the gasoline plant at maximum efficiency.

(D) Restrictions upon the amount of deliveries by reason of reserved contractual rights to use gas for lease operations.

(E) Restrictions upon the amount of deliveries arising out of plaintiffs' contractual obligations to their lessors.

(F) Restrictions upon the amount or rate of takes by the pipe line purchaser imposed by law or contract.

The above restrictions may operate to terminate deliveries of gas, either permanently or temporarily, or to increase or decrease deliveries.

In some cases, and at some times, the movement of gas from the reservoir to the pipe line of the interstate transmission company is physically continuous and un-
28 interrupted. In other cases and at other times such movement is interrupted and is therefore not continuous. The flow of gas may be increased, decreased or interrupted by plaintiffs at the wellhead or by the purchasers from the plaintiffs at valves at the wellhead or in such purchasers' gathering lines, plants or pipe lines.

6. Gulf Oil Corporation is making approximately 40 separate sales of gas for processing under the conditions outlined and set forth in category (C) of paragraph 4 above. Upon advice of counsel, plaintiff Gulf Oil Corporation did not make application for certificates of public convenience and necessity nor file rate schedules with the Commission prior to December 1, 1954, insofar as the aforesaid contracts are concerned. Neither has plaintiff Gulf Oil Corporation made certificate applications or rate schedule filings with reference to said contracts since December 1, 1954, nor has it authorized any operator of a processing plant to do so as its agent pursuant to Section 154.91(b)(3) of Order 174-B.

7. Gulf Oil Corporation has in force and effect certain agreements covering the sale of casinghead gas for processing, the terms of which entitle it to an increase in the price to be paid by the processing purchaser. Because of the assertion of jurisdiction by the Commission over sales for processing, some of plaintiff's purchasers will not pay the increased prices to which it is entitled according to the terms of its gas sales contracts, resulting in losses and injury to said plaintiff.

Plaintiff Gulf Oil Corporation is obligated to pay its royalty owners on the basis of "market price" or "market value" of gas sold and are, therefore, subject to multiple claims and lawsuits by royalty owners for the difference in

the "market price" or "market value" of the gas sold by them and the lower price paid by purchasers who will not give effect to plaintiff's gas sales agreements calling for increased prices. Likewise, plaintiff Gulf Oil Corporation is subject to multiple claims against it by the State of Texas for additional production taxes based upon the "market value" of the gas rather than the lower price basis
29 resulting from failure and refusal of gas purchasers to pay plaintiff Gulf Oil Corporation price increases pursuant to the terms of their gas sales agreements. Gulf Oil Corporation is subject to losses and injury because of its inability to collect, in accordance with the terms thereof, the prices contemplated and agreed upon in the following agreements covering sales of gas for processing, i.e., sales of the character described in category (C) of paragraph 4 hereof:

(1) Gas Sales Contract between Gulf Oil Corporation, as Seller, and Tex-Harvey Gasoline Plant, as Buyer, dated May 13, 1952, and amendments thereto, under which gas is being sold from certain properties of Gulf Oil Corporation in the Sprayberry Field, Midland County, Texas.

Under the terms of the aforementioned agreement, Tex-Harvey Gasoline Plant became obligated, as of September 1, 1954, to increase the payments to Gulf Oil Corporation for (a) gasoline, (b) propane, (c) butane, and (d) mixtures of propanes and butanes extracted from gas delivered under the aforementioned agreement by an amount equal to 40% of the prices in effect prior to that date.

(2) Gas Sales Contract between Gulf Oil Corporation, as Seller, and Stanolind Oil and Gas Co. et al, as Buyers, dated July 6, 1948, and amendments thereto, under which Gulf Oil Corporation is selling casinghead gas from certain of its properties in the Fullerton Field, Andrews County, Texas.

This agreement provides for an increase in the price of gas sold thereunder, effective September 1, 1954, to permit Seller to recoup 50% of the increase in the Texas Production Tax imposed upon and paid by Seller.

30 In each of the agreements set forth above, plaintiff Gulf Oil Corporation delivers gas to purchasers for processing liquid hydrocarbons therefrom and the purchasers of said gas, not Gulf Oil Corporation, sell the residue gas remaining after processing.

8. Plaintiff Gulf Oil Corporation is suffering further injury and losses because of its inability to collect increases in the prices of gas sold under certain contracts as to which delivery of gas is made by Gulf Oil Corporation at the wellhead, or, if not at the wellhead, prior to completion of the gathering process. Some of plaintiff Gulf Oil Corporation's sales in this category, under which purchasers have not paid the price increases provided for in their sales agreements, are as follows:

(1) Gas Sales Contract between Gulf Refining Company and Ohio Oil Company, as Sellers, and Arkansas-Louisiana Gas Company, as Buyer, dated October 1, 1950, and amendments thereto, under which gas is being sold from certain properties of Gulf Refining Company in the Haynesville Field, Claiborne Parish, Louisiana.

This agreement, as amended, provides for an increase in the price of gas sold thereunder, effective October 1, 1954, from 10.346¢ per MCF to 10.796¢ per MCF, plus the right by Seller to recoup 100% of the Louisiana Gas Gathering Tax.

(2) Gas Sales Contract between Gulf Refining Company and others, as Sellers, and Arkansas-Louisiana Gas Company, as Buyer, dated October 31, 1951, under which gas is being sold from certain properties of Gulf Refining Company in the Haynesville Field, Claiborne Parish, Louisiana.

This agreement provides for an increase in the price of gas sold thereunder, effective October 1, 1954, from 10.346¢ per MCF to 10.796¢ per MCF, plus the right by Seller to recoup 100% of the Louisiana Gas Gathering Tax.

(3) Gas Sales Contract between Bert Fields, as
31 Seller, and Arkansas-Louisiana Gas Company, as Buyer, dated August 1, 1950, and amendments thereto, under which gas is being sold from certain

properties of Gulf Oil Corporation in the Waskom Field, Harrison County, Texas.

This agreement, as amended, provides for an increase in the price of gas sold thereunder effective January 10, 1955, from 9.3409¢ per MCF to 9.7796¢ per MCF, plus the right by Seller to recoup 100% of any increase in certain taxes paid by Seller, including the Texas Production Tax.

In addition to the foregoing, Gulf Oil Corporation is threatened with future losses and injury because of its inability to collect its price increase under the following agreement:

Gas Sales Contract between Stanolind Oil & Gas Company and Continental Oil Company, as Sellers, and Mississippi River Fuel Corporation, as Buyer, dated April 3, 1951, as amended, and as ratified by Gulf Oil Corporation by Agreement dated October 15, 1951, under which gas is being sold from certain properties of Gulf Oil Corporation in the Woodlawn Field, Harrison County, Texas.

This agreement, as amended, provides for an increase in the price of gas sold thereunder effective April 3, 1955, from 13.000¢ per MCF to 13.500¢ per MCF, plus the right by Seller to recoup ¾th of any increase in certain taxes paid by Seller, including the Texas Production Tax.

9. Plaintiffs cannot make new sales of gas which may ultimately be sold or transported in interstate commerce without subjecting such sales to the jurisdiction of the Federal Power Commission, even though its sales and delivery of gas be made at the wellhead and prior to the completion of the gathering process.

32 Because of the foregoing, plaintiffs are now suffering irreparable injury because they cannot prudently makes sales of gas to an interstate pipe line carrier from the following fields:

(A) San Salvador Field, Hidalgo County, Texas.

(B) Corpus Christi Bay Field, Nueces County, Texas.

(C) Southwest Helen Gohlke Field, Victoria County, Texas.

(D) Quinduno Field, Roberts County, Texas.

In each of the aforementioned cases, Gulf Oil Corporation can produce and sell gas only if it will first obtain a certificate of public convenience and necessity, thereby placing its gas sales price in jeopardy of reduction by the Commission, to the detriment of Gulf Oil Corporation and its royalty owners, or, in the alternative, sell its gas without a certificate and subject itself and its gas purchasers to onerous penalties under the Commission's construction of the Natural Gas Act and its regulations issued thereunder.

As a producer of oil and gas, plaintiffs cannot prudently enter into gas sales agreements which may place beyond its control the future use of its gas for repressuring and secondary recovery operations to conserve oil or gas or to facilitate the production thereof.

(S.) R. C. FREDERICK.

Subscribed and sworn to before me this 3rd day of February, 1955.

(S.) DOROTHY M. HUGHES,
Notary Public.

My commission expires January 7, 1959. Dorothy M. Hughes, Notary Public, Gulf Building, Pittsburgh, Pa. [SEAL.]

33 IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 515-55

Filed February 4, 1955, Harry M. Hull, Clerk

GULF OIL CORPORATION AND GULF REFINING COMPANY, P. O. BOX 1166, PITTSBURGH 30, PENNSYLVANIA, *Plaintiffs*,

v.

FEDERAL POWER COMMISSION; HON. JEROME K. KUYKENDALL, CHAIRMAN; HON. CLAUDE L. DRAPER, HON. NELSON LEE SMITH, HON. SEABORN L. DIGBY, AND HON. FREDERICK STUECK, COMMISSIONERS, 441 G STREET, N. W., WASHINGTON, D. C., *Defendants*

MOTION FOR TEMPORARY IN JUNCTION

Come now the plaintiffs by their attorneys and respectfully move the court to grant a preliminary injunction in the above entitled action, enjoining and restraining the defendants, their agents, servants and employees from enforcing or attempting to enforce in any manner, directly or indirectly, against plaintiffs, with respect to any of plaintiffs' sales of gas at the wellhead described in category (b) of paragraph 11 of the complaint for which plaintiffs do not obtain a certificate of public convenience and necessity and with respect to plaintiffs' sales of gas for processing described in category (c) of paragraph 11 of the complaint, Federal Power Commission Order No. 174-B and the rules and regulations purported to be issued thereby and thereunder and the Natural Gas Act pending a final hearing and determination of the above-entitled action on the merits.

The grounds for this motion are the matters alleged in

the complaint herein, as supplemented by the affi-
34 davit filed in support of this motion.

(S.) ARCHIE D. GRAY,
P. O. Box 1166,
Pittsburgh, Pennsylvania,
(S.) STEWART W. MARK,
P. O. Box 661,
Tulsa, Oklahoma,
(S.) MERLE E. MINKS,
P. O. Drawer 2100
Houston, Texas,
(S.) JESSE P. LUTON, JR.,
P. O. Drawer 1290,
Fort Worth, Texas,
(S.) MAC ASBILL,
Ring Building,
18th and M Streets, N. W.,
Washington, D. C.,
Attorneys for Plaintiffs
Gulf Oil Corporation and
Gulf Refining Company.

NOTICE

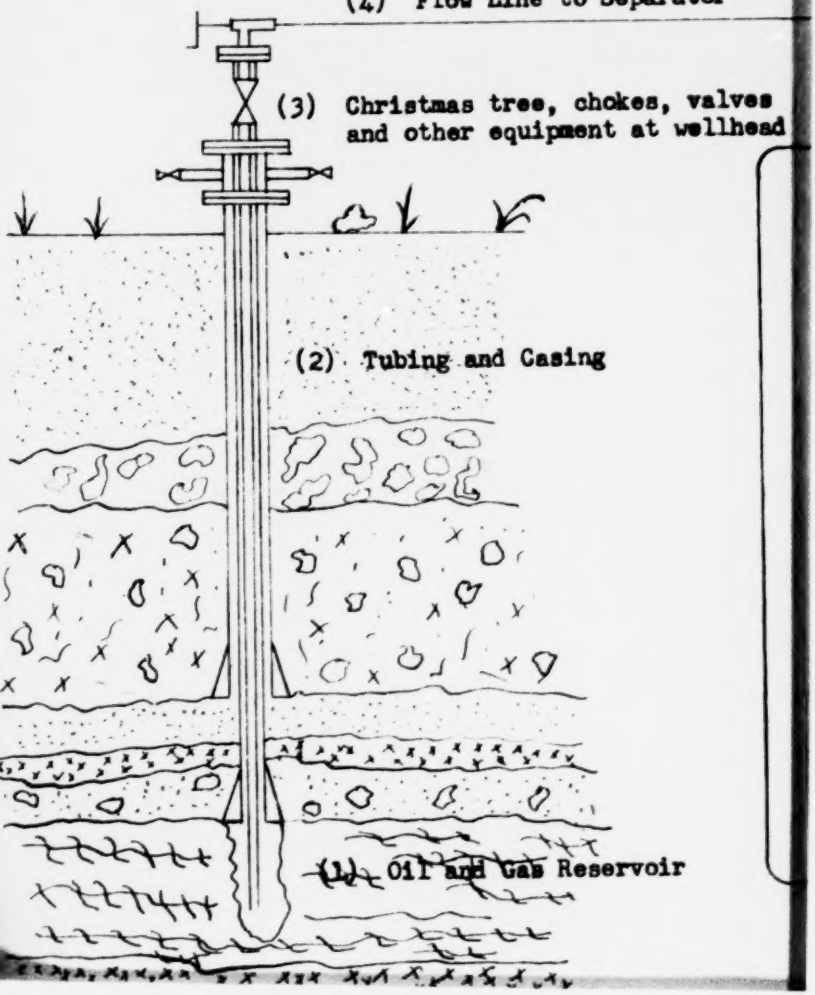
To:

Federal Power Commission; Hon. Jerome K. Kuykendall, Chairman; Hon. Claude L. Draper, Hon. Nelson Lee Smith, Hon. Seaborn L. Digby and Hon. Frederick Stueck, Commissioners, 441 G Street, N. W., Washington, D. C.

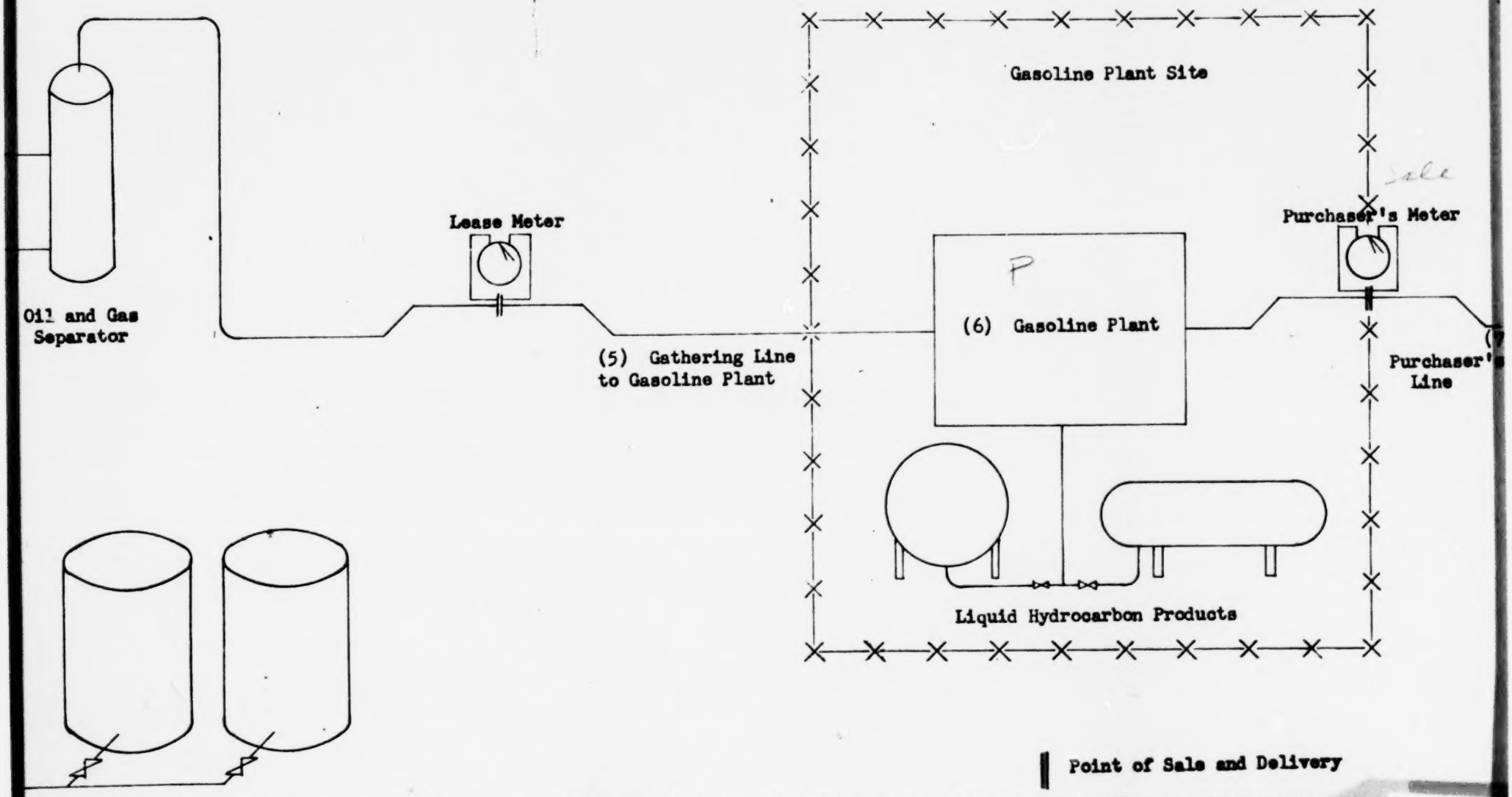
Please take notice that if you desire to oppose the foregoing motion, you shall within five (5) days after
35 service of a copy of the same upon you, serve a copy of your points and authorities in opposition thereto upon counsel for the plaintiffs and file the original thereof with the clerk of said court, otherwise said motion may be submitted to the court as conceded.

(S.) ARCHIE D. GRAY,
P. O. Box 1166,
Pittsburgh, Pennsylvania,
(S.) STEWART W. MARK,
P. O. Box 661,
Tulsa, Oklahoma,
(S.) MERLE E. MINKS,
P. O. Drawer 2100
Houston, Texas,
(S.) JESSE P. LUTON, JR.,
P. O. Drawer 1290,
Fort Worth, Texas,
(S.) MAC ASBILL,
Ring Building,
18th and M Streets, N. W.,
Washington, D. C.,
Attorneys for Plaintiffs
Gulf Oil Corporation and
Gulf Refining Company.

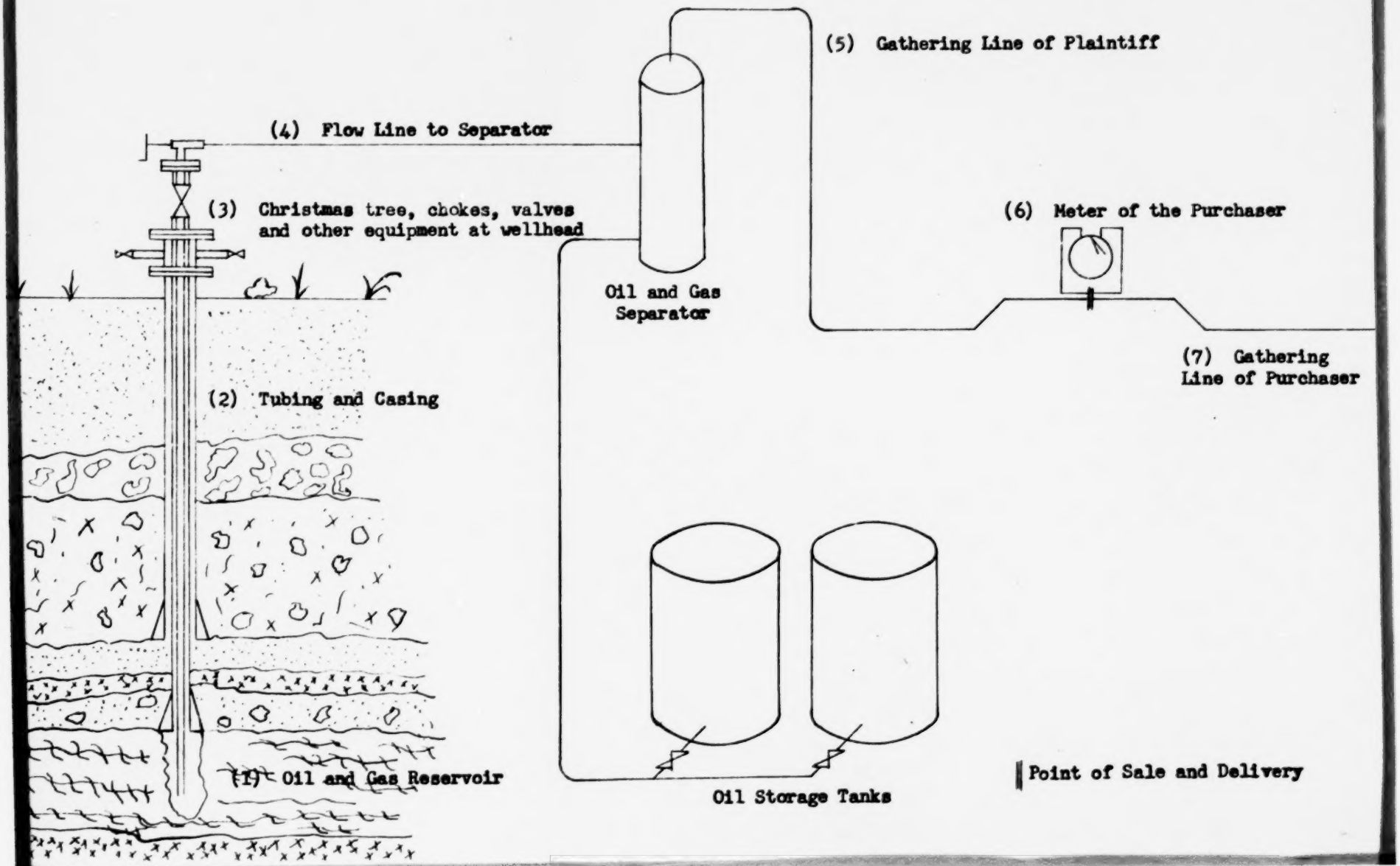
(Here follow 3 charts, folios 36-38)

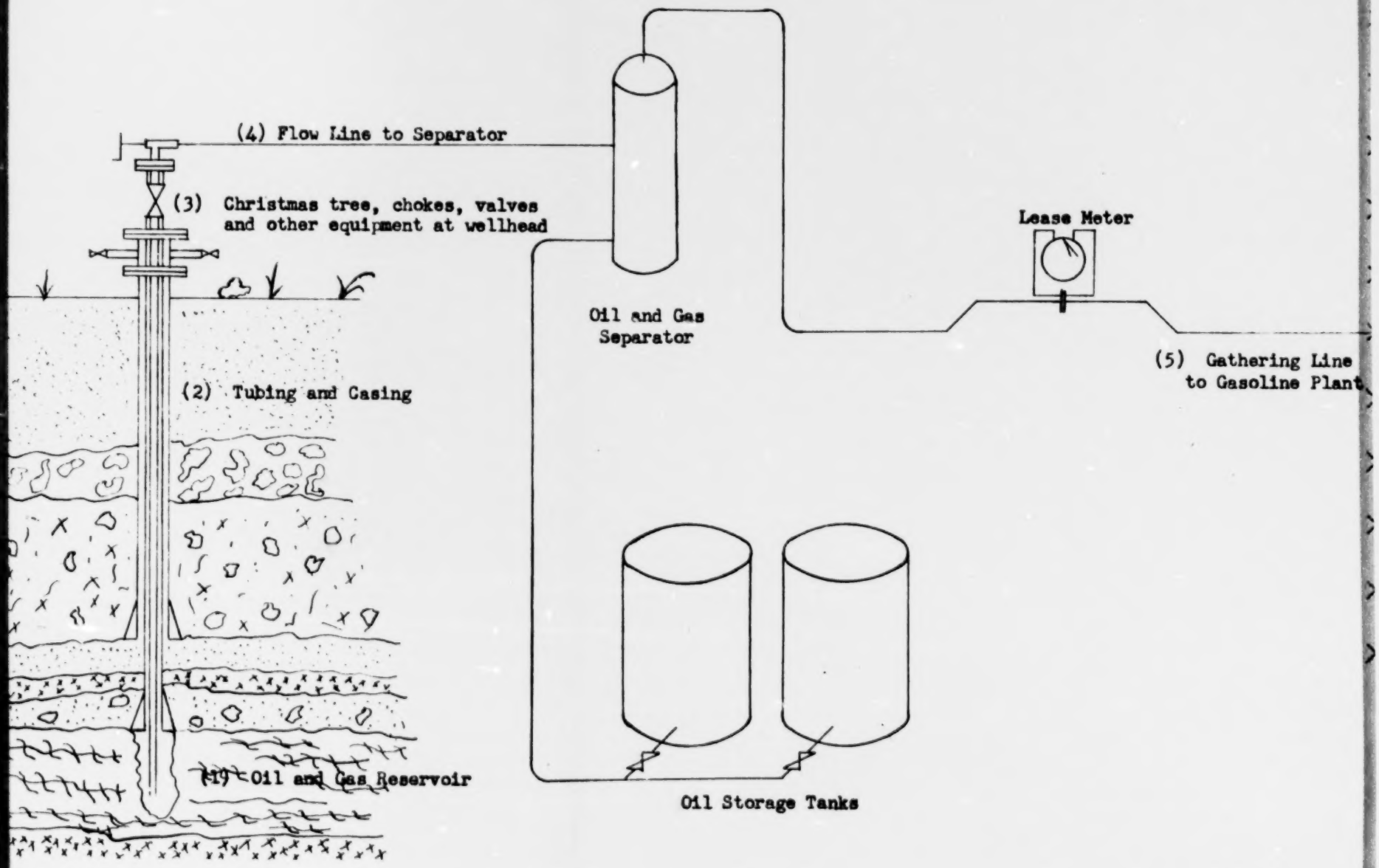

(4) Flow Line to Separator
(3) Christmas tree, chokes, valves and other equipment at wellhead
(2) Tubing and Casing
(1) Oil and Gas Reservoir

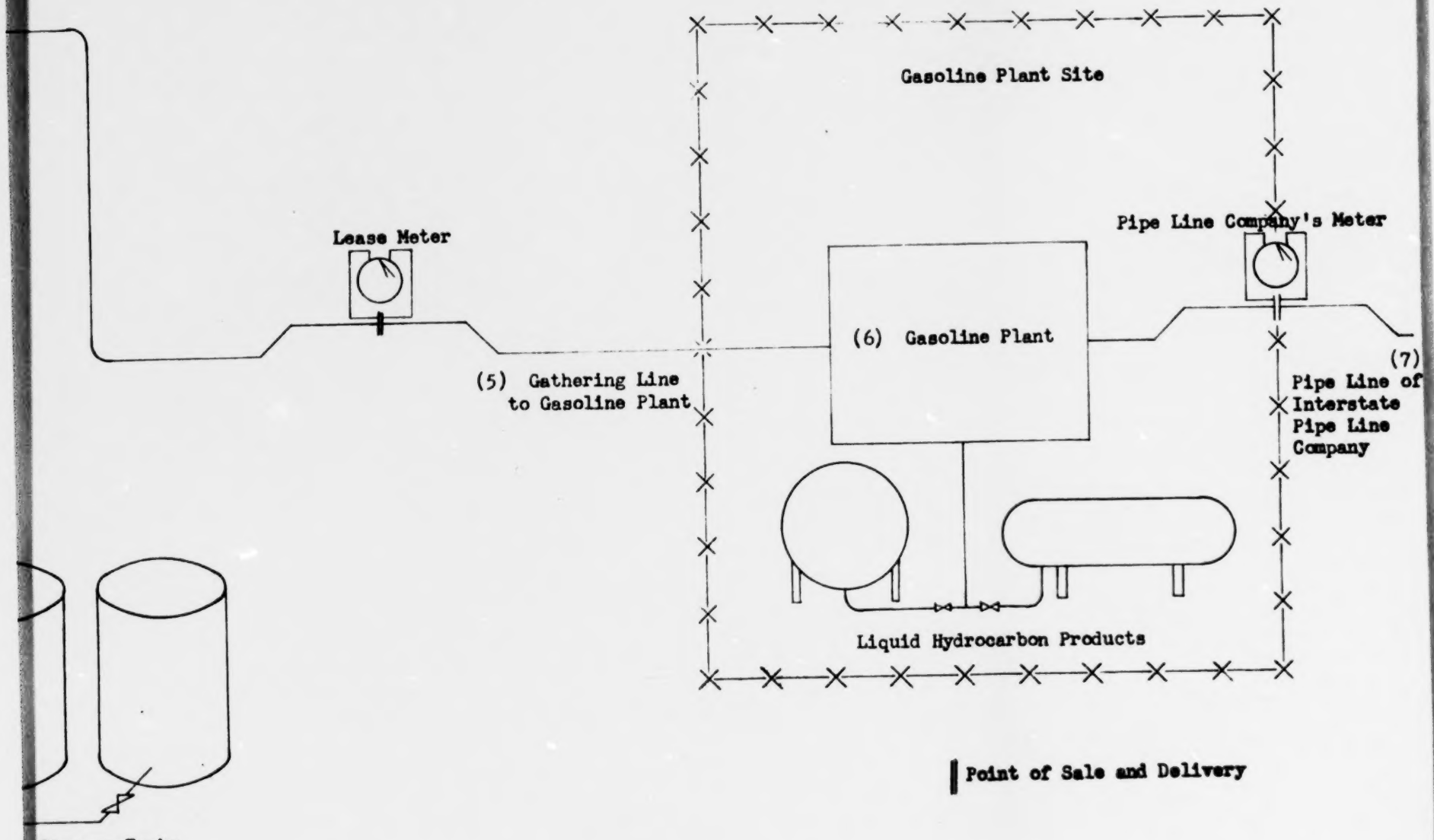
CATEGORY (A)


Gasoline Plant Site
Lease Meter
Purchaser's Meter
Oil and Gas Separator
(6) Gasoline Plant
(5) Gathering Line to Gasoline Plant
Purchaser's Line
Liquid Hydrocarbon Products
Point of Sale and Delivery

CATEGORY (B)


(5) Gathering Line of Plaintiff
(4) Flow Line to Separator
(3) Christmas tree, chokes, valves and other equipment at wellhead
(6) Meter of the Purchaser
Oil and Gas Separator
(7) Gathering Line of Purchaser
(2) Tubing and Casing
(1) Oil and Gas Reservoir
Oil Storage Tanks
Point of Sale and Delivery


(4) Flow Line to Separator
(3) Christmas tree, chokes, valves and other equipment at wellhead
Lease Meter
Oil and Gas Separator
(5) Gathering Line to Gasoline Plant
(2) Tubing and Casing
(1) Oil and Gas Reservoir
Oil Storage Tanks


Gasoline Plant Site
Lease Meter
Pipe Line Company's Meter
(6) Gasoline Plant
(5) Gathering Line to Gasoline Plant
(7) Pipe Line of Interstate Pipe Line Company
Liquid Hydrocarbon Products
Point of Sale and Delivery
Storage Tanks

39 IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

C. A. No. 515-55

Filed February 23, 1955, Harry M. Hull, Clerk.

GULF OIL CORPORATION, AND GULF REFINING COMPANY, *Plaintiffs,*

vs.

FEDERAL POWER COMMISSION, ET AL., *Defendants*

Washington, D. C.
Friday, February 18, 1955.

RULING FROM THE BENCH on MOTION FOR TEMPORARY INJUNCTION, by the Hon. James R. Kirkland, Judge.

* * * * * *

THE COURT: In the case of Gulf Oil Corporation and Gulf Refining Company, plaintiffs, vs. the Federal Power Commission, C. A. No. 515-55, the plaintiff herein under date of February 4, 1955, filed in this Court a complaint for declaratory judgment, injunction and equitable relief, and has predicated that complaint largely upon the features and promulgations of an order designated as 174-B issued by the Federal Power Commission under date of December 17, 1954.

The defendant has not answered to the complaint, but instead the motion for a preliminary injunction, with accompanying points and authorities, has been opposed by the defendant through the filing of points and authorities in opposition on February 14, 1955. Although the matter is here only on motion for a temporary injunction, the
40 force of the argument is virtually that of an application for a permanent injunction.

Interestingly enough, the entire controversy revolves around the recent decision of the United States Supreme Court in the case of Phillips Petroleum Company vs. Wisconsin, which was decided June 7, 1954, and reported at

347 U. S. 672. It is interesting to a trial court to hear the defendant is the cause argue that before the Supreme Court of the United States the Power Commission itself took the position that wholesale transactions, especially at the source of what is known popularly as wet natural gas, were beyond its congressional grant of authority. However, in interpreting the various cases which have been before it, and through Mr. Justice Minton, page 682, the Supreme Court stated as follows:

> "Rather we believe that the legislative history indicates a congressional intent to give the commission jurisdiction over the rates of all wholesales of natural gas in interstate commerce, whether by a pipeline company or not, and whether occurring before, during, or after transmission by an interstate pipeline company. There can be no dispute that the overriding congressional purpose was to plug the 'gap' in regulation of natural gas companies resulting from judicial decisions prohibiting on federal constitutional grounds state regulation of many of the interstate aspects of the natural gas business. A significant part of this gap was created by cases holding that 'the regulation of wholesale rates of gas and electrical energy moving in interstate commerce is beyond the constitutional powers of the States,' " citing Interstate Natural Gas Company vs. Federal Power Commission, 331 U. S. 682, 689.

Further along in its opinion the Court at page 685 stated:

> "Regulation of the sales in interstate commerce for resale made by a so-called independent natural gas producer is not essentially different from regulation of such sales when made by an affiliate of an interestate pipeline company. In both cases, the rates charged may have a direct and substantial effect on the price paid by the ultimate consumers. Protection of consumers against exploitation at the hands of natural-gas companies was the primary aim of the Natural Gas Act," citing Federal Power Commission vs.
41 Hope Natural Gas Company, 320 U. S. 591, 610. Continuing at page 685:

"Attempts to weaken this protection by amendatory legislation exempting independent natural-gas producers from federal regulation have repeatedly failed, and we refuse to achieve the same result by a strained interpretation of the existing statutory language."

The Court has quoted from the opinion of the Supreme Court for two purposes: First, the growing tendency in federal jurisdiction is to enlarge the scope of federal power to clearly control those things which upon entering the stream of interstate commerce become part of the volume and flow of interstate commerce. Since the famous case of Sheckner vs. N. R. A. down to the very latest case of United States vs. International Boxing Club of New York, that tendency has been present. Second, even though the Power Commission felt it lacked jurisdiction under the Natural Gas Act, nevertheless the Supreme Court went far beyond even the Commission's expectation and declared that in the wholesale phase the Commission very clearly and definitely had jurisdiction.

The entire matter before us is pitched upon the effect of the broad ruling in the Phillips Petroleum case. The date of the decision was referred to. It becomes important, since the Federal Power Commission, faced with the almost insurmountable task of regulating a very complicated industry, was compelled to exercise its regulatory powers. Accordingly, the Commission modified Order 174 and 174-A by issuing Order 174-B on December 7, 1954, to all those who might be involved.

Read from its four corners, Order 174-B attempts to get some semblance of order and regulation whereby rates, control and supervision of all types of both wet and dry
42 natural gas from sources of supply to ultimate use in interstate commerce might come under general regulating authority.

It is noteworthy that in the Natural Gas Act itself there is a provision for suspending rates. One relief which plaintiff is asking is a preliminary injunction. Plaintiff has entered into long-term contracts with escalator clauses touching upon the scale at which plaintiff shall sell either its raw natural gas or its refined natural gas, thus placing

itself in the position of possibly receiving strict state supervision or loss of income, or both. Plaintiff is confronted with the problem that if it fails to obey the federal mandate issued by the Federal Power Commission, it subjects itself to very heavy penalties of some $500 a day for disobedience to the same.

In order that we may arrive at a proper posture of the case, in the argument and from the pleadings, the plaintiff contends that it has three types of natural gas. There is one type described as residue gas, which the Court understands are sales of gas after processing has been completed when the wet material, notably sulphur and other carbon compounds are removed from the natural product which nature has provided. We might call that the furnishing of dry gas. Counsel for the plaintiff concedes that under the ruling in the Phillips Petroleum case this type of sale is within the jurisdiction of the Federal Power Commission, and it is in compliance therewith.

However, there are two other types of sales or service which plaintiff contends are not within the Phillips Petroleum case. The second is one referred to as type (b). Type (b) is the sale of what has been designated as raw natural gas sold at the wellhead. From the plaintiff's point of view, it is contended that this is the production or the gathering of raw gas and is not gas which flows in interestate commerce. The third type is sold under specific contract to another, and in that specific contract there is the direct requirement that raw gas shall be processed and dry gas shall then flow from the one who purchases in interstate commerce.

43

If this were a matter of first impression on whether pipelines wholly within a state touching and being attached to other interstate pipelines are subject to interstate commerce regulation, it might raise a serious question. However, with the length and breadth of recent opinions coming from the Supreme Court, it has the general appearance of being in the flow of interstate commerce in natural gas.

Another striking thing about this case is that the Gulf Oil Corporation receives raw gas in the great State of Texas, famous for its size and expansion but having only

a few large cities and relatively little manufacturing. One can almost perceive that while Texas has been blessed by nature, the use of its gas is naturally going to flow to the more populous centers of our country and to those great industrial centers in the workshop of America. I point to that because the Court does not feel that the first contention of whether this is intra or interstate is a serious one.

On the other hand, the defendant argues that this Court is ousted of jurisdiction because this is an administrative proceeding and that the federal courts will not give advisory opinions, that is, will not assume jurisdiction unless there is a justificable claim or controversy. There is merit to that argument. However, this Court is firmly convinced by the holding of Ex parte Young, cited at 209 U. S. 123, that

> where, as here, there is a serious contention made
> 44 that a company may be in violation of both state and
> federal regulations in addition to being confronted

by a very serious penalty of heavy daily charge, that it does have a justiciable issue against a possibility that administrative authorities will so delay the determination of an issue as to practically oust such companies from their remedies in federal courts.

It has been urged by the defendant that the only appeal from administrative proceedings of the Federal Power Commission lies by direct appeal to the United States Circuit Court of Appeals for the District of Columbia Circuit. That is true, of course, if there is a genuine adversary proceeding. But here the record shows that the Federal Power Commission, confronted with this very drastic, far-reaching opinion of the Phillips Petroleum case issuing out of the Supreme Court on June 7, 1954, had to act with drastic speed, and commendably did so by issuing Order 174. It invited and received opposition, or points and authorities in opposition, to its projected control. On the strength of the briefs received and arguments heard, it promulgated Order 174-A, and then, after argument and further briefs, it issued the modified Order 174-B.

One of the foremost things in this case is that the very points which plaintiff now argues are before the Federal Power Commission for administrative determination. Ac-

cordingly, the Court is going to rule, first, that in a proper case where irreparable damage is shown, a federal court is not ousted of jurisdiction to enjoin the improper, capricious and arbitrary action of an administrative hearing. The Court also holds, as a matter of fact and law, that there is pending before the Federal Power Commission a case which will be determinative of the very issues involved here, and that that case has not been finally adjudicated. In a broad sense the administrative remedies of the plaintiff have not been exhausted. And third, and foremost, the plaintiff has not shown by the four corners of this record and by the argument and by proffers of proof that there has been irreparable damage at the present time. Accordingly, the Court will deny the motion of plaintiff for a temporary injunction.

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* * * * * * *

REPORTER'S CERTIFICATE

Certified to be the official transcript of proceedings indicated in Gulf Oil Corporation v. Federal Power Commission, C. A. No. 515-55, Friday, February 18, 1955.

ROBERT I. THIEL,
Official Reporter.

46 IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 515-'55

Filed March 14, 1955, Harry M. Hull, Clerk

GULF OIL CORPORATION AND GULF REFINING COMPANY,
Plaintiffs

vs.

THE FEDERAL POWER COMMISSION; HON. JEROME K. KUYKENDALL, Commissioner, Chairman; HON. CLAUDE L. DRAPER, Commissioner; HON. NELSON LEE SMITH, Commissioner; HON. SEABORN L. DIGBY, Commissioner; HON. FREDERICK STUECK, Commissioner, 441 G Street, N. W., Washington, D. C., *Defendants*

ORDER

This cause came on to be heard February 18, 1955 on Plaintiffs' motion for a preliminary injunction enjoining and restraining the Defendants from enforcing as to certain of Plaintiffs' sales of natural gas Federal Power Commission Order No. 174-B and the Natural Gas Act, and the Court having considered the verified complaint for declaratory judgment, injunction and equitable relief and the affidavit submitted in support of the aforesaid motion for preliminary injunction, makes the following

FINDINGS

1. The controversy in this case evolves around the decision of the United States Supreme Court in *Phillips Petroleum Co.* v. *Wisconsin* 347 U. S. 672, decided June 7, 1954.

2. Subsequent to the decision of the United States Supreme Court in *Phillips Petroleum Co.* v. *Wisconsin* 347 U. S. 672, the Federal Power Commission on December 17, 1954 issued an order designated as Order No. 174-B (19 F. R. 8807, December 2, 1954).

3. Said Order No. 174-B embodies rules and regulations governing, among other things, the filing of rate

schedules and applications for certificates of public convenience and necessity by so-called "independent producers" of natural gas which are also "natural-gas companies" as the latter term is defined in the Natural Gas Act.

47 4. Said Order No. 174-B was issued to all those "independent producers" who might be involved and brought within the jurisdiction of the Federal Power Commission under the decision of the United States Supreme Court in *Phillips Petroleum Co.* v. *Wisconsin* 347 U. S. 672.

5. Plaintiffs are engaged in the production of natural gas and the sale thereof in numerous States of the United States, and each sale is made in the State in which the gas is produced.

6. Plaintiffs, in several States, engage in the business of selling "residue" natural gas at the tailgate or outlet pipe of processing plants owned in whole or in part by them within the State of production for transportation and resale in interstate commerce and concede that under the ruling in the *Phillips* case, *supra,* such sales are within the jurisdiction of the Federal Power Commission.

7. Plaintiffs in several States engage in the business of selling natural gas at the wellhead within the State of production under contracts which do not provide for the processing of such gas by the purchaser and where some or all such gas may ultimately be transported or resold in interstate commerce by the purchaser.

8. Plaintiffs, in several State, engage in the business of selling natural gas at the wellhead within the State of production under contracts which expressly provide for the processing of such gas by the purchaser and where some or all of such gas may ultimately be transported or resold in interstate commerce by the purchaser.

9. The issues raised by Plaintiffs before the Court with respect to the Federal Power Commission's jurisdiction over the sales of natural gas referred to in Findings 7 and 8 hereof are involved in a proceeding

pending before the Commission to which Plaintiffs are not parties, and the decision therein may be determinative of the issues involved herein.

10. Federal Power Commission Order No. 174-B attempts to get some semblance of order and regulation whereby rates, control and supervision of all types of both wet and dry natural gas from sources of supply to ultimate use in interstate commerce might come under general regulating authority of the Commission.

11. The administrative remedies of the Plaintiffs have not been exhausted.

12. Plaintiffs have not shown that there is irreparable damage at the present time.

CONCLUSIONS

1. Plaintiffs have not shown that they have been or will be irreparably damaged by Federal Power Commission Order No. 174-B.

2. Plaintiffs have not presented a proper case warranting the issuance of a preliminary injunction.

48 WHEREFORE, upon the foregoing considerations and findings and for the further reasons stated in the Court's ruling from the bench made on February 18, 1955, and the Court being sufficiently advised in the premises, it is

ORDERED, that the Plaintiffs' motion for preliminary injunction be denied.

Entered at Washington, D. C., this 14th day of March, 1955.

(S) JAMES R. KIRKLAND,
United States District Judge.

Approved as to form:
(S) MAC ASBILL,
Counsel for Plaintiffs.

• • • • • • •

49 IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 515-'55

Filed March 15, 1955, Harry M. Hull, Clerk

GULF OIL CORPORATION AND GULF REFINING COMPANY, P. O. Box 1166, Pittsburgh 30, Pennsylvania, *Plaintiffs*

v.

FEDERAL POWER COMMISSION; HON. JEROME K. KUYKENDALL, CHAIRMAN; HON. CLAUDE L. DRAPER, HON. NELSON LEE SMITH, HON. SEABORN L. DIGBY, and HON. FREDERICK STUECK, COMMISSIONERS, 441 G Street, N. W., Washington, D. C., *Defendants*

MOTION FOR INJUNCTION PENDING APPEAL

Plaintiffs move the Court to grant an injunction pending appeal and for grounds of such motion allege:

1. On March 14, 1955, the Court entered an order denying the motion of plaintiffs for a preliminary injunction.

2. Plaintiffs are prepared to and will file an appeal to the United States Court of Appeals for the District of Columbia to review the prior ruling of this Court denying a preliminary injunction. The appeal will be filed as soon as the Court acts upon this motion.

3. The complaint in this cause raises fundamental and substantial issues as to whether the Natural Gas Act is applicable to plaintiffs' wellhead sales and sales for processing, described in categories (b) and (c) respectively of Paragraph 11 of the complaint, and as to whether Order No. 174-B in so far as it attempts to regulate such sales is invalid because beyond the statutory power of the Federal Power Commission and invalid in its entirety because issued without proper notice and hearing in violation of the Administrative Procedure Act and the Natural Gas Act.

50 4. When Order No. 174-B was issued, three of the five members of the Federal Power Commission expressed doubt as to whether wellhead sales and sales for

processing are subject to the jurisdiction of the Commission under the Natural Gas Act. Since then conflicting orders have been entered by two judges of this Court respecting the subject matter of the complaint. A preliminary injunction was granted by Judge Holtzoff in *Union Producing Company* v. *Federal Power Commission*, Civil Action No. 4949-'54. On a substantially similar set of facts, Judge Kirkland denied the motion for preliminary injunction in the pending cause. The Commission has appealed from the order allowing a preliminary injunction in the *Union* case. It is only fair that plaintiffs should be protected by an injunction while their appeal is pending before the Court of Appeals for the District of Columbia, to the same extent as is Union, whose rights are protected by a preliminary injunction.

5. Order No. 174-B is a reviewable order under Section 10(a) and 10(c) of the Administrative Procedure Act (5 U. S. C. Sections 1009(a), (c)) and under the holding of the Court of Appeals for the District of Columbia in *United Gas Pipe Line Co.* v. *Federal Power Commission*, 181 F. 2d 796, and related cases, including *Columbia Broadcasting System* v. *United States*, 316 U. S. 407.

6. An injunction pending appeal is necessary to preserve the subject matter of the litigation pending review on appeal; to protect plaintiffs from the disruption of their business and other irreparable injury resulting from the disruption of their business and other irreparable injury resulting from the enforcement against them of the Natural Gas Act and Order No. 174-B with respect to plaintiffs' wellhead sales and sales for processing; and to protect plaintiffs against liability for penalties accruing under Section 21 of the Natural Gas Act during the pendency of the appeal should the contentions of plaintiffs not be sustained. The facts alleged in plaintiffs' verified complaint and set forth in the supporting affidavit of Mr. R. C. Frederick show that as a result of the promulgation, application, and enforcement of Order No. 174-B plaintiffs' purchasers have refused to take gas unless plaintiffs first obtain a certificate of public convenience and necessity from the Commission and have refused to pay plain-

51

tiffs the increased prices and tax reimbursements as provided in existing contracts of sale unless plaintiffs obtain Commission approval of such increases and reimbursements; that plaintiffs will be delayed in, and possibly prevented by the Commission from withdrawing gas from the market for repressuring, pressure maintenance, or other operations designed to obtain the maximum ultimate recovery of oil from the reservoir; and that plaintiffs are subjected to conflicting regulation by the Commission and by the respective state conservation authorities and subject to severe penalties if they violate the regulations or orders of either the Commission or the state conservation authorities.

7. The Court, in granting an injunction pending appeal, would not be passing upon the validity of Order No. 174-B or whether the Natural Gas Act authorizes the Commission to regulate wellhead sales and sales for processing. Instead, the granting of such an injunction would merely preserve the status quo while the appeal from the denial of a temporary injunction is pending.

WHEREFORE, plaintiffs pray that the Court grant an injunction to be effective during the pendency of the appeal to the Court of Appeals for the District of Columbia from the order denying plaintiffs' application for preliminary injunction and that said injunction enjoin and restrain defendants, their agents, servants and employees, from enforcing or attempting to enforce in any manner, directly or indirectly, against plaintiffs, with respect to any of plaintiffs' sales of gas at the wellhead described in category (b) of Paragraph 11 of the complaint for which plaintiffs do not obtain a certificate of public convenience and necessity and with respect to plaintiffs' sales of gas for processing de-

scribed in category (c) of Paragraph 11 of the com-
52 plaint, Federal Power Commission Order No. 174-B and the rules and regulations purported to be issued thereby and thereunder and the Natural Gas Act.

Respectfully submitted,

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STEWART W. MARK,
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MERLE E. MINKS,
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MAC ASBILL,
Ring Building,
18th and M Streets, N. W.,
Washington, D. C.,
Attorneys for Plaintiffs,
Gulf Oil Corporation and
Gulf Refining Company.

ACKNOWLEDGMENT OF SERVICE

Receipt of copy of the foregoing motion for injunction pending appeal is acknowledged.

This 15th day of March, 1955.

WILLARD W. GATCHELL,
General Counsel,
Federal Power Commission,
441 G Street, N. W.,
Washington, D. C.,
Attorney for Defendants.

53 IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 515-'55

Filed March 31, 1955, Harry M. Hull, Clerk

GULF OIL CORPORATION AND GULF REFINING COMPANY, P. O. Box 1166, Pittsburgh 30, Pennsylvania, *Plaintiffs*,

v.

FEDERAL POWER COMMISSION; HON. JEROME K. KUYKENDALL, Chairman; HON. CLAUDE L. DRAPER, HON. NELSON LEE SMITH, HON. SEABORN L. DIGBY, and HON. FREDERICK STUECK, Commissioners, 441 G Street, N. W., Washington, D. C., *Defendants*

ORDER DENYING MOTION OF PLAINTIFFS FOR AN INJUNCTION PENDING APPEAL

Now on this 31st day of March, 1955, it appearing to the Court that heretofore on the 24th day of March, 1955, the Court, upon consideration of the Memorandum of Points and Authorities filed by Plaintiffs and opposing memorandum filed by Defendants, made an oral ruling upon the motion of Plaintiffs for a stay injunction pending appeal by which ruling the motion was "denied, without prejudice to renew the motion in the United States Court of Appeals for the District of Columbia Circuit", and it further appearing that no formal order was made and entered denying said motion.

It is now as of the 24th day of March, 1955, ordered that the motion of Plaintiffs for an injunction pending appeal be and the same is hereby denied, without prejudice to the rights of Plaintiffs to renew such motion in the United States Court of Appeals for the District of Columbia Circuit.

(S.) JAMES R. KIRKLAND,
United States District Judge.

I consent:

(S.) WILLARD W. GATCHELL,
Attorney for Defendants.

54 IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 515-'55

Filed March 25, 1955, Harry M. Hull, Clerk

GULF OIL CORPORATION AND GULF REFINING COMPANY, P. O. Box 1166, Pittsburgh 30, Pennsylvania, *Plaintiffs*,

v.

FEDERAL POWER COMMISSION; HON. JEROME K. KUYKENDALL, Chairman; HON. CLAUDE L. DRAPER, HON. NELSON LEE SMITH, HON. SEABORN L. DIGBY, and HON. FREDERICK STUECK, Commissioners, 441 G Street, N. W., Washington, D. C., *Defendants*

NOTICE OF APPEAL

Notice is hereby given that Gulf Oil Corporation and Gulf Refining Company, plaintiffs above stated, hereby appeal to the United States Court of Appeals for the District of Columbia Circuit from the findings, conclusions and order of the District Court, denying the motion of plaintiffs for a preliminary injunction, entered and filed in this action on March 14, 1955.

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Fort Worth, Texas,
(S.) MAC ASBILL,
Ring Building,
18th and M Streets, N. W.,
Washington, D. C.,
Attorneys for Plaintiffs-Appellants, Gulf Oil Corporation and Gulf Refining Company.

55 ACKNOWLEDGMENT OF SERVICE

Receipt of copy of the foregoing notice of appeal is acknowledged.

This 25th day of March, 1955.

(S.) WILLARD W. GATCHELL,
General Counsel,
Federal Power Commission,
441 G Street, N. W.,
Washington, D. C.,
Attorney for Defendants-Appellees.

56 IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 515-'55

Filed March 25, 1955, Harry M. Hull, Clerk

GULF OIL CORPORATION AND GULF REFINING COMPANY, P. O. Box 1166, Pittsburgh 30, Pennsylvania, *Plaintiffs*,

v.

FEDERAL POWER COMMISSION; HON. JEROME K. KUYKENDALL, Chairman; HON. CLAUDE L. DRAPER, HON. NELSON LEE SMITH, HON. SEABORN L. DIGBY, and HON. FREDERICK STUECK, Commissioners, 441 G Street, N. W., Washington D. C., *Defendants*

WAIVER OF COST BOND ON APPEAL

It is stipulated between plaintiffs and defendants that no bond for cost on appeal need be filed by plaintiffs in connection with their notice of appeal from the order denying their application for a preliminary injunction.

(S.) JESSE P. LUTON, JR.,
P. O. Drawer 1290,
Fort Worth, Texas,

(S.) MAC ASBILL,
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Washington 6, D. C.,
Attorneys for Plaintiffs-Appellants,
Gulf Oil Corporation and Gulf Refining Company.

(S.) WILLARD W. GATCHELL,
General Counsel,
Federal Power Commission,
441 G Street, N. W.,
Washington, D. C.,
Attorney for Defendants-Appellees.

57 IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 515-'55

Filed March 25, 1955, Harry M. Hull, Clerk.

GULF OIL CORPORATION AND GULF REFINING COMPANY, P. O. Box 1166, Pittsburgh 30, Pennsylvania, *Plaintiffs*

v.

FEDERAL POWER COMMISSION; HON. JEROME K. KUYKENDALL, Chairman; HON. CLAUDE L. DRAPER, HON. NELSON LEE SMITH, HON. SEABORN L. DIGBY, and HON. FREDERICK STUECK, Commissioners, 441 G Street, N. W., Washington, D. C., *Defendants*

STATEMENT OF POINTS ON APPEAL

Plaintiffs herewith present the points upon which they claim that the District Court erred:

1. In denying the application of plaintiffs for a preliminary injunction.

2. In failing to grant a preliminary injunction to protect plaintiffs from the imposition of unconscionable penalties under Section 21 of the Natural Gas Act and from irreparable losses and injuries to, and disruptions of, their business as a result of the unlawful application and enforcement by defendants of Order No. 174-B and the Natural Gas Act with respect to plaintiffs' wellhead sales, and sales for processing, of natural gas, pending a judicial determination on the merits of the serious legal questions presented by the allegations of the verified complaint and supporting affidavit relating to the validity of Order No. 174-B and to the jurisdiction of the Federal Power Commission under the Natural Gas Act over plaintiffs' wellhead sales, and sales for processing, of natural gas.

3. In failing to grant a preliminary injunction because Section 1(b) of the Natural Gas Act deprives the Federal Power Commission of jurisdiction over plaintiffs'
58 wellhead sales, and sales for processing, of natural gas.

4. In failing to grant a preliminary injunction because

Order No. 174-B in so far as it purports to regulate plaintiffs' wellhead sales, and sales for processing, of natural gas exceeds the power granted to the Commission under the Natural Gas Act.

5. In failing to grant a preliminary injunction because Order No. 174-B fixes retroactively the rates or prices at which wellhead sales, and sales for processing, of natural gas shall be made by plaintiffs, whereas the only power granted the Commission in the Natural Gas Act is to fix rates prospectively.

6. In failing to grant a preliminary injunction because the Federal Power Commission has no power under the Natural Gas Act to fix the rates or prices at which wellhead sales, and sales for processing, of natural gas shall be made by plaintiffs in the total absence of any hearing.

7. In failing to grant a preliminary injunction because the prices fixed, including escalator clauses and provisions for absorption of state taxes by purchasers, under private contracts between plaintiffs and their purchasers for wellhead sales, and sales for processing, of natural gas are rates which plaintiffs are entitled to file as initial rates under Section 4(c) of the Natural Gas Act, if any rates are required to be filed for such sales, and the Commission has no power to change such rates or prices except after hearings as provided in Sections 4(e) and 5(a) of the Natural Gas Act.

8. In failing to grant a preliminary injunction because Order No. 174-B, as interpreted and applied by defendants unlawfully extends the application of Section 7(b) of the Natural Gas Act, pertaining to abandonment of services, to the producing facilities and operations of plaintiff, whereas the Commission has no jurisdiction over such facilities and operations and the attempted regulation thereof by defendants interferes with valid state conservation laws, deprives plaintiffs of the right to operate their business so as to make the best use of their natural gas, and subjects plaintiffs to conflicting regulations by defendants and state conservation authorities, including enormous penalties for violating the conflicting regulations.

59 9. In failing to grant a preliminary injunction because Order No. 174-B is invalid as a promulgation

of a rule in that the requirements for rule making pertaining to notice and hearing in the Administrative Procedure Act (5 U. S. C. 1003) were not complied with in the promulgation of said Order.

10. In failing to grant a preliminary injunction because the undisputed facts show that plaintiffs' failure to comply with Order No. 174-B will subject them to such unconscionable daily penalties under Section 21 of the Natural Gas Act that plaintiffs are entitled to a preliminary injunction, under the principle announced in *Ex Parte Young*, 209 U. S. 123, pending a judicial determination as to the validity of said order, and the applicability of the Natural Gas Act to plaintiffs' wellhead sales, and sales for processing, of natural gas.

11. In making a clearly erroneous finding of fact, Finding No. 9, that the issues raised in the complaint respecting the Commission's jurisdiction over wellhead sales, and sales for processing, of natural gas are involved in a proceeding pending before the Commission to which plaintiffs are not parties and that the decision therein "may" be determinative of the issues involved herein, whereas

(a) there is not a scintilla of evidence in the record to support any such finding;

(b) *as a matter of law* no decision by the Commission, in a proceeding to which plaintiffs are not parties, respecting the scope of its authority under the Natural Gas Act could be determinative of plaintiffs' rights in the pending case because the issues respecting the limits of the statutory powers of the Commission are issues which the Commission may not finally decide but are issues which can only be judicially decided by a court in the exercise of its judicial function;

(c) as a matter of law any decision by the Commission in a proceeding instituted by other parties before the Commission could not be determinative of the legal issues as to plaintiffs who are not parties to that proceeding;

60 (d) denying a preliminary injunction to plaintiffs, on the erroneous legal basis that a proceed-

ing by other parties before the Commission "may" be determinative of the legal issues raised in this cause by plaintiffs, is an abuse of the Court's discretion, based on an erroneous understanding of the law, in that it leaves the rights of plaintiffs subject to the uncertain outcome of some possible *future* decision by the Commission and fails to exercise the judicial function of this Court to protect the rights of plaintiffs with respect to fundamental legal issues raised by the verified complaint and supporting affidavit and which issues only a court may finally decide.

12. In making a clearly erroneous finding of fact, Finding No. 11, that plaintiffs had not exhausted their administrative remedies, whereas the complaint was duly filed after the issuance of Order No. 174-B overruling plaintiffs' application for a rehearing and asserting jurisdiction over the wellhead sales, and sales for processing of natural gas, and said Order was final agency action which was subject to judicial review under Sections 10(a) and 10(e) of the Administrative Procedure Act, 5 U. S. C. 1009(a), (e).

13. In making a clearly erroneous finding of fact, Finding No. 12, that plaintiffs had not shown irreparable injury "at the present time," when there was *no evidence to support such finding* and the verified complaint and supporting affidavit of Mr. Frederick showed without contradiction that plaintiffs are being and will be irreparably injured (a) by being subjected to unconscionable daily penalties under Section 21 of the Natural Gas Act if they fail to comply with Order No. 174-B, (b) by having the operation of their business disrupted by the refusal of purchasers to carry out existing contracts or to enter into new contracts for the purchase of plaintiffs' natural gas, and (c) by being subjected to conflicting regulations of defendants and state regulatory agencies respecting the use of plaintiffs' gas, unless defendants are enjoined from enforcing said order,

and the Natural Gas Act, with respect to plaintiffs'
61 wellhead sales, and sales for processing, of natural gas pending judicial determination of the serious

legal issues raised by the verified complaint and supporting affidavit.

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Ring Building,
18th and M Streets, N. W.,
Washington, D. C.,
Attorneys for Plaintiffs-Appellants,
Gulf Oil Corporation and
Gulf Refining Company.

ACKNOWLEDGMENT OF SERVICE

Receipt of copy of the foregoing Statement of Points on Appeal is acknowledged.

This 25th day of March, 1955.

(S) WILLARD W. GATCHELL,
General Counsel,
Federal Power Commission,
441 G Street, N. W.,
Washington, D. C.,
Attorney for Defendants-Appellees.

(Here follow 2 Exhibits, folios 64, 65)

56A

CIVIL DOCKET

United States District Court for the District of Columbia

Parties	Attorneys	Number
		515-55
	Mac Asbill	
GULF OIL CORPORATION	Ring Bldg.	Action for
ET AL.		DECLARATORY JUDGMENT
v.		
FEDERAL POWER COMMISSION		Taxed Costs
ET AL.		Atty.
		Marshal
		Clerk
		Witnesses
		Depositions
		Examiner
	Jury demand ☐	Ct. Appls.
	Report Judgt. ☐	TOTAL

Date	Account	Rec'd	Disb'd	Date	Account	Rec'd	Disb'd
1955							
Feb. 4	Asbill	10 00					

CIVIL DOCKET

United States District Court for the District of Columbia

DATE		PROCEEDINGS	FEES	TOTAL
1955		Deposit for cost by		
Feb	4	Complaint, appearance Exhibits, affidavit filed		
"	4	Summons copies (6 and copies (6) of Complaint issued all ser. [illegible] 2-4-55 [illegible]		14
"	4	**Motion of Pltff for Preliminary Injunction P&A M.C. 2-4-55** [illegible]		
Feb	8	Stipulation between counsel extending time within which defts shall file P&A in opposition to pltf's motion for preliminary injunction. filed		
Feb	14	Memorandum of P&A in opposition to motion for preliminary injunction; app of Willard W. Gatchell; c/m 2-14-55. filed		
Feb	18	**Transcript of proceedings of 2-18-55; reporter:Thiel; pp 1-7 filed**		
Mar	9	Transcript of proceedings, 2-18-55; pp 1-90 incl; reported:Thiel. filed		
Mar	14	Change of address of atty for deft. filed		
Mar	14	Findings of fact and conclusions of law and order denying motion of pltf for preliminary injunction. (N) Kirkland, J.		
Mar	15	Motion of pltfs for injunction pending appeal; ser.ack., 3-15-55; P&A; M.C. 3-15-55		
Mar	21	Memorandum of P&A in opposition to motion for injunction pending appeal; c/m 3-21-55		
Mar	25	Notice of appeal by pltfs; deposit of $5.00 by Mashbill; copy mailed to Willard W. Gatchell, atty for defts by clerk. filed		
Mar	25	Stipulation designating record on appeal.		
Mar	25	Statement of points & authorities on appeal; ser.ack., 3-25-55 filed		
"		Stipulation of waiver of cost bond on appeal.		

Office - Supreme Court, U. S.
FILED
MAY 18 1956
HAROLD B. WILLEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 888

GULF OIL CORPORATION and GULF REFINING COMPANY,

Petitioners

v.

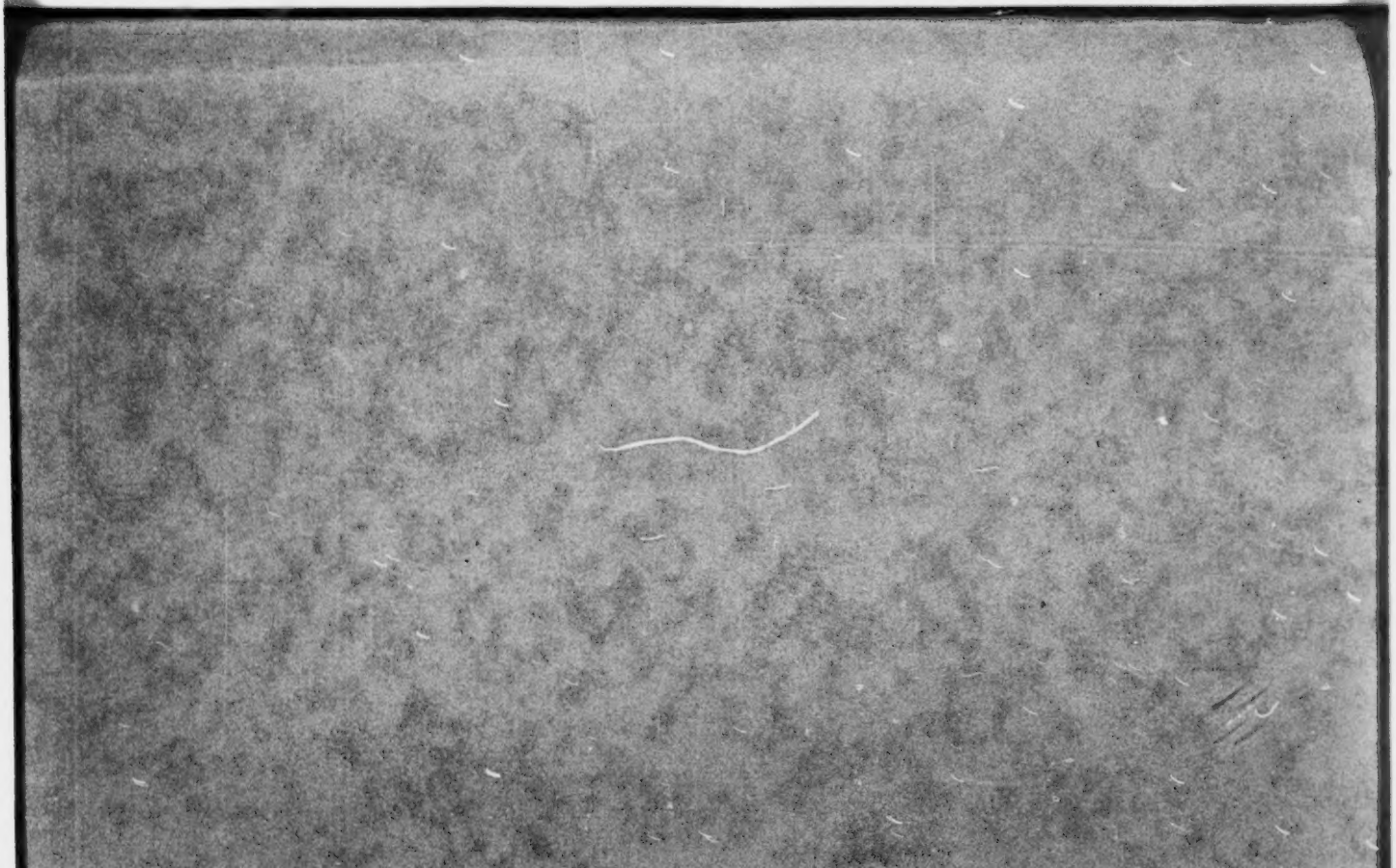
FEDERAL POWER COMMISSION, et al,

Respondents

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 888

GULF OIL CORPORATION and GULF REFINING COMPANY,

Petitioners

v.

FEDERAL POWER COMMISSION, et al,

Respondents

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Since the filing of the petition for writ of certiorari herein, this Court on April 23, 1956, rendered its opinion in *Frozen Food Express v. United States and Interstate Commerce Commission*, No. 158, October Term, 1955, reported in 24 Law Week 4202, in which this Court reversed the judgment of a three-judge district court dismissing the action on the ground that the order of the Interstate Commerce Commission was not subject to judicial review.[1]

That case arose out of an investigation instituted by the Interstate Commerce Commission which resulted in the issuance of an order that specified commodities are not "agricultural" within the meaning

[1]Other appeals which were the subject of this opinion were Interstate Commerce Commission v. Frozen Food Express, et al, No. 159; American Trucking Associations, Inc., et al, v. Frozen Food Express, et al, No. 160; Akron, Canton and Youngstown R. Co., et al, v. Frozen Food Express, et al, No. 161.

of Section 203(b)(6) of the Interstate Commerce Act. This section provides that the requirements for a certificate or permit are not applicable to "motor vehicles used in carrying property consisting of ordinary livestock, fish (including shell fish), or agricultural (including horticultural) commodities (not including manufactured products thereof), if such motor vehicles are not used in carrying any other property, or passengers, for compensation."

The position of Frozen Food Express, the plaintiff in the district court, was described by this Court as follows:

> "Frozen Food Express, the plaintiff, is a motor carrier transporting numerous commodities which the Commission ruled were nonexempt under § 203(b)(6) but which the carrier claims are 'agricultural commodities.' Plaintiff, who was not a party to the administrative proceeding, instituted suit before a three-judge District Court (28 U.S.C. § 2325) to enjoin the order of the Commission and have it set aside, naming the United States and the Commission as defendants. 28 U.S.C. § 1336; 49 Stat. 550, as amended, 49 U.S.C. § 305(g); 60 Stat. 243, 5 U.S.C. § 1009. The complaint alleged that plaintiff is a common carrier by motor vehicle, holding a certificate of public convenience and necessity which authorizes it to transport certain commodities between designated points and places; that plaintiff is transporting in addition to those commodities, commodities which are exempt under § 203(b)(6) and for which plaintiff has sought no authority from the Commission; that the Commission in its order has held the latter commodities non-

exempt and accordingly has deprived it of the right granted by the statute; that the order of the Commission classifying certain commodities as nonexempt is unlawful; and that the Commission threatens to enjoin transportation of the commodities which plaintiff claims are exempt." (24 L.W. at 4202-4203)

In reversing the judgment of the district court dismissing the action, this Court said:

"The District Court, being of the view that the case was controlled by *United States v. Los Angeles R. Co.*, 273 U.S. 299, dismissed the action, saying that the 'order' of the Commission was not subject to judicial review. 128 F.Supp. 374. The cases are here by appeal. 28 U.S.C. §§ 1253, 2101(b).

"We disagree with the District Court. We do not think *United States v. Los Angeles R. Co., supra*, is controlling here. In that case the 'order' held nonreviewable was a valuation of a carrier's property made by the Commission. The Court held that the 'order' was no more than a report of an investigation which might never be the basis of a proceeding before the Commission or a court. Mr. Justice Brandeis, speaking for the Court, said:

" 'The so-called order here complained of is one which does not command the carrier to do, or to refrain from doing, any thing; which does not grant or withhold any authority, privilege or license; which does not extend or abridge any power or facility; which does not subject the carrier to any liability, civil or criminal; which does not change the carrier's existing or future status or condition; which does not determine any right or obligation. This so-called order is merely the

formal record of conclusions reached after a study of data collected in the course of extensive research conducted by the Commission, through its employees. It is the exercise solely of the function of investigation . . . .' 273 U.S. 309-310.

"The situation here is quite different. The determination by the Commission that a commodity is not an exempt agricultural product has an immediate and practical impact on carriers who are transporting the commodities, and on shippers as well. The 'order' of the Commission warns every carrier, who does not have authority from the Commission to transport those commodities, that it does so at the risk of incurring criminal penalties. § 222(a). Where unauthorized operations occur, the Commission may proceed administratively and issue a cease and desist order. § 204(c). Such orders of the Commission are enforceable by the courts. § 222(b). And wilful violation of a cease and desist order is ground for revocation of a certificate or permit. § 212. The determination made by the Commission is not therefore abstract, theoretical, or academic. Cf. *El Dorado Oil Works v. United States*, 328 U.S. 12, 18-19. The 'order' of the Commission which classifies commodities as exempt or nonexempt is, indeed, the basis for carriers in ordering and arranging their affairs. Cf. *Rochester Tel. Corp. v. United States*, 307 U.S. 125, 132. Carriers who are without the appropriate certificate or permit, because they believe they carry exempt commodities, run civil and criminal risks. A carrier authorized to carry specified commodities and dependent on exempt articles for its return load may lose its right to operate at all, if it does not respect the Commission's 'order.' Carriers and shippers alike are told that

> they are or are not free to bargain for rates, that they must or must not pay the filed charges. The 'order' of the Commission is in substance a 'declaratory' one, see 60 Stat. 240, 5 U.S.C. § 1004(d), which touches vital interests of carriers and shippers alike and sets the standard for shaping the manner in which an important segment of the trucking business will be done. Cf. *Columbia Broadcasting System v. United States*, 316 U.S. 407. The consequences we have summarized are not conjectural. The Commission itself places this interpretation on its action, and argues, contrary to its position in the *Los Angeles Case*, *supra*, for finality of the order. We conclude that the issues raised in the complaint are justiciable and that the District Court should adjudicate the merits." (24 L.W. at 4203)

Petitioners here are in substantially the same position as was Frozen Food Express in the above case. The complaint and supporting affidavit (J.A. 7, 22-24) show that petitioners make sales of natural gas of the type involved in *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672, and held by this Court to be subject to the Natural Gas Act. With respect to these sales, petitioners have filed with the Federal Power Commission applications for certificates of public convenience and necessity. In addition to these sales, the complaint and supporting affidavit (J.A. 7-8, 24-26) show that petitioners make sales of gas which are not the type involved in the *Phillips* case and which petitioners contend are not subject to the Commission's jurisdiction under the Natural Gas Act but over which the Commission has asserted jurisdiction by Orders Nos. 174-A and 174-B.

For example, in Section 154.91(b) of Order No. 174-B the Commission expressly asserts jurisdiction over certain sales for processing by requiring producers selling to the processing plant to file, in the absence of a filing by the plant operator, "where the payments by such operator to the producers represent a percentage of the proceeds of the sale thereof by the operator." (Appendix to petition, pp. 22-23) Since petitioners make sales of this type, this determination by the Commission that such sales are subject to the Natural Gas Act, like the determination involved in the *Frozen Food Express* case, "has an immediate and practical impact" on petitioners and on those purchasing such gas from petitioners. Also, this order, like the order in that case, warns petitioners and other producers similarly situated who do not have authority from the Commission to make such sales that they do so at the risk of incurring criminal penalties under Section 21 of the Natural Gas Act (15 U.S.C. 717t). Therefore, the statement of this Court in the *Frozen Food Express* case that "The determination made by the Commission is not . . . abstract, theoretical, or academic" is equally applicable in this case and supports the review sought of the orders in question.

Respectfully submitted,

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May 18, 1956

CERTIFICATE OF SERVICE

I, Jesse P. Luton, Jr., counsel of record for Gulf Oil Corporation and Gulf Refining Company, petitioners herein, hereby certify that on the 17th day of May, 1956, I served copies of the foregoing supplemental brief in support of petition for writ of certiorari by mailing copies thereof in a duly addressed envelope with air mail postage prepaid to the attorneys for respondents as follows:

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 888

GULF OIL CORPORATION and GULF REFINING COMPANY, PETITIONERS

v.

FEDERAL POWER COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the District Court (Pet. App. 49-60) is reported at 128 F. Supp. 446. The opinion of the Court of Appeals (Pet. App. 61) is reported at 230 F. 2d 40.

JURISDICTION

The judgment of the Court of Appeals was entered on January 30, 1956, and a petition for rehearing was denied on March 21, 1956. The petition for a writ of certiorari was filed on April 20, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Petitioners are independent producers who admittedly make sales of natural gas for resale in interstate commerce and so, by virtue of this Court's ruling in *Phillips Petroleum Co.* v. *Wisconsin,* 347 U.S. 672, are subject to regulation by the Federal Power Commission under the Natural Gas Act. Petitioners, however, claim that some of their natural gas sales are not subject to Commission regulation. The question presented is whether, in these circumstances, a District Court has jurisdiction to determine this issue despite petitioners' failure to invoke and exhaust the Commission's procedures for deciding the question.

STATUTE AND ORDER INVOLVED

The relevant provisions of the Natural Gas Act are set forth in Petitioners' Appendix, pp. 1-9. The order of the Federal Power Commission here involved is set forth in Petitioners' Appendix, pp. 15-48.

STATEMENT

Petitioners, independent producers of natural gas, by a complaint filed in the District Court for the District of Columbia sought to enjoin the Federal Power Commission from enforcing the Natural Gas Act and Federal Power Commission Order No. 174-B (Pet. App. 15) against certain of their gas sales. Order No. 174-B was issued by the Commission in December 1954 to establish a procedure for effectuating this Court's decision in *Phillips Petroleum Co.* v *Wisconsin,* 347 U. S. 672, that independent producers of natural gas selling in interstate commerce for resale are subject to regulation under the Natural Gas Act. Petitioners conceded the applicability of the Na-

tural Gas Act to their sales of residue gas—the type of sale involved in the *Phillips* decision—and filed applications for certificates of convenience and necessity and rate schedules covering those sales, prior to the issuance of Order No. 174-B. In February 1955, petitioners brought this action to enjoin the Commission from enforcing the Natural Gas Act and orders issued thereunder against their wellhead sales and sales of gas for processing, asserting that only their sales of residue gas were subject to the Act under the *Phillips* decision.

Following a hearing on a motion by petitioners for a preliminary injunction, the District Court (Pet. App. 53-56), after noting that petitioners were in compliance with Order No. 174-B with regard to their sales of residue gas and that the question of the applicability of the Act to petitioners' wellhead sales and sales of gas for processing was then pending before the Commission, denied the motion, holding that petitioners were required to exhaust their administrative remedy before the Commission. The District Court also held that petitioners were not entitled to an injunction in any case, since they have "not shown by the four corners of this record and by the argument and by proffers of proof that there has been irreparable damage at the present time" (Pet. App. 56).

Petitioners appealed to the Court of Appeals for the District of Columbia Circuit [1] from the District Court's order denying their motion for a preliminary injunction, contending that the Natural Gas Act was inapplicable to their wellhead sales and sales of gas for processing and that the application of Order No. 174-B to these sales should be enjoined. The Court of Appeals

[1] The Court of Appeals denied a motion by petitioners for injunction pending appeal on April 15, 1955.

affirmed the District Court's order on the authority of its decision in *Union Producing Company* v. *Federal Power Commission,* No. 12,583-4, decided January 30, 1956 (Pet. App. 63), certiorari denied, No. 792, this Term, May 7, 1956, which vacated a preliminary injunction, obtained by another independent producer, on the ground that the producer was required to exhaust its administrative remedies.

ARGUMENT

1. The instant petition involves substantially the same issue as that raised in *Union Producing Co.* v. *Federal Power Commission,* No. 792, this Term, certiorari denied, May 7, 1956: namely, whether a District Court has jurisdiction to decide whether certain sales made by an independent natural gas producer are subject to regulation under the Natural Gas Act, prior to a Commission determination of that question. The Court of Appeals held in *Union Producing* that an independent gas producer was not entitled to have its status under the Act adjudicated prior to Commission determination of that issue. Petitioners' claim that they are not subject to the Act as to at least some of their sales, and that the Court of Appeals erred in affirming (on the authority of its *Union Producing* decision) an order denying petitioners' motion for a preliminary injunction, is as much without merit as the *Union Producing Company's* claim which is dealt with in the Commission's brief in opposition (at pp. 6-15) in No. 792. The Court is respectfully referred to that brief in opposition.

2. Petitioners admit (Pet. 19) that they make certain sales which are subject to regulation, and that they

are natural gas companies within the meaning of the Act as interpreted by this Court in the *Phillips Petroleum* decision, but contend that they are entitled to an immediate judicial determination as to the jurisdictional status of certain other sales. However, it is clearly the Commission's function to decide in the first instance whether a particular sale of gas is jurisdictional, *Federal Power Commission* v. *Colorado Interstate Gas Co.*, 348 U. S. 492, 501, and a number of avenues were open to petitioners for obtaining a Commission ruling (as well as subsequent judicial review) on the status of the disputed sales under the Act, including the declaratory order procedure provided by Section 1.7(c) of the Commission's rules. The Commission's Order 174-B was procedural in nature, and did not purport to determine which of petitioners' gas sales (including the sales here at issue) were subject to regulation, in contrast to the orders held reviewable in original injunction actions by *Columbia Broadcasting System* v. *United States*, 316 U. S. 407, and *Frozen Food Express* v. *United States, et al.*, Nos. 158-161, this Term, decided April 23, 1956; see the Commission's brief in opposition in No. 792, at pp. 12, 13. Moreover, the District Court found (Pet. App. 60) that petitioners had not made a sufficient showing of irreparable injury to entitle them to equitable relief. Hence petitioners were doubly required to pursue the remedy available before the Commission in order to ascertain whether certain of their sales were subject to the Act.

It should also be noted that the precise issue raised by petitioners—whether sales at the wellhead and sales of gas for processing are subject to regulation—is now pending before the Court of Appeals for the Fifth Cir-

cuit in proceedings to review declaratory orders of the Commission pursuant to Section 19 of the Natural Gas Act,[2] and a judicial determination in those cases, although of course not directly applicable to petitioners, may serve to clarify their status under the Natural Gas Act.

CONCLUSION

For the above reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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[2] *Deep South Oil Co.* v. *Federal Power Commission*, No. 15,849; *Humble Oil & Refining Co.* v. *Federal Power Commission*, No. 15,884; *Shell Oil Co.* v. *Federal Power Commission*, No. 15,900.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 888

GULF OIL CORPORATION and GULF REFINING COMPANY,

Petitioners

v.

FEDERAL POWER COMMISSION, et al,

Respondents

REPLY TO BRIEF FOR THE RESPONDENTS IN OPPOSITION

In an effort to get this Court to take the same action in this case as was taken in *Union Producing Co. v. Federal Power Commission*, No. 792, this term, respondents in their brief in opposition, like the Court of Appeals, have completely ignored the differences between the positions of Union and petitioners. Respondents would have this Court believe that the only question presented by petitioners' complaint is whether certain sales made by petitioners are subject to regulation under the Natural Gas Act. This is shown by the statement on page 4 of the brief in opposition that "The instant petition involves substantially the same issue as that raised in *Union Producing Co. v. Federal Power Commission*, No. 792, this term, certiorari denied, May 7, 1956: namely, whether a District Court has jurisdiction to decide whether certain sales

made by an independent natural gas producer are subject to regulation under the Natural Gas Act, prior to a Commission determination of that question."

In the petition for certiorari, petitioners discuss the differences between their position and that of Union Producing Company. The first of these is that petitioners make sales declared by this Court in *Phillips Petroleum Co. v. Wisconsin*, 347 U. S. 672, to be subject to regulation by the Federal Power Commission under the Natural Gas Act. With respect to these sales there is no necessity for any further determination by the Commission as to petitioners' status since that question has already been determined by this Court. This gives petitioners legal standing to challenge the validity of Orders Nos. 174-A and 174-B and the legality of certain provisions of those orders as they apply to these jurisdictional sales made by petitioners.

Union, on the other hand, denied that it made any sales subject to regulation under the Natural Gas Act and in this respect was in the same position as were the petitioners in the opinion by the Court of Appeals for the Tenth Circuit set out in the Appendix to the brief for the respondents in opposition in Cause No. 792. That opinion involved petitions to review Orders Nos. 174-A and 174-B brought under Section 19(b) of the Natural Gas Act by Amerada Petroleum Corporation, Midstates Oil Corporation, Cities Service Oil Company, and Skelly Oil Company. In its opinion the Court of Appeals repeatedly stressed that petitioners did not admit that they were subject to the

Natural Gas Act and that there had been no holding or determination that the orders were applicable to any of the petitioners. The Court said:

> "Without even admitting that the Commission has jurisdiction over them and without a finding by the Commission that it has jurisdiction over any of petitioners, petitioners contend that the order violates their substantive rights in several important respects and, therefore, constitutes a final appealable order."

It is clear, therefore, that insofar as their Phillips type sales are concerned, which are subject to regulation under the Natural Gas Act, the position of petitioners is materially different from that of Union and the petitioners involved in the proceedings before the Court of Appeals for the Tenth Circuit. With respect to these sales, no question of status or coverage is involved in this suit; no further action on the part of the Commission is necessary for these orders to be applicable to petitioners; there is no administrative remedy to be exhausted; and petitioners have legal standing to seek judicial review of the orders in question.

The second material difference between the position of petitioners and that of Union is that Order No. 174-A was involved in the *Union* case while No. 174-B is involved in this case. As pointed out on page 20 of the petition for certiorari, the latter order contains a provision (Section 154.91(b)) not contained in Order No. 174-A expressly asserting jurisdiction over certain sales of gas for processing by requiring producers selling to the processing plant to file, in the ab-

sence of a filing by the plant operator, "where the payments by such operator to the producers represent a percentage of the proceeds of the sale thereof by the operator." With respect to this type of sales, which petitioners admittedly make, there is likewise no question of status or coverage involved since Order No. 174-B is clearly applicable to petitioners without any further action by the Commission. Therefore, insofar as these sales are concerned, petitioners have legal standing to question the validity of Order No. 174-B and the jurisdiction of the Commission over these sales.

In their brief in opposition, respondents refer to their brief in opposition filed in the *Union* case. On pages 12-13 of that brief respondents attempt to distinguish *Columbia Broadcasting System v. United States*, 316 U. S. 407, by saying that "that case did not involve a question of coverage, for the Communications Commission regulations were clearly applicable to all radio station licensees," while "Here, the Power Commission must decide initially whether petitioner is subject to the Act at all." The above differences between Union and petitioners show that this alleged distinction of the *Columbia Broadcasting System* case is not applicable here because petitioners have already been determined to be subject to the Natural Gas Act insofar as their Phillips type sales are concerned and have been expressly declared by Order No. 174-B to be subject to that order insofar as they make gas sales of the type described in Section 154.91(b) thereof.

On page 13 of their brief in opposition in the *Union* case, respondents attempt to further distinguish the *Columbia Broadcasting System* case by stating that "the regulations in the *Columbia Broadcasting* case —unlike the present Order—were substantive and not merely procedural in nature, since they outlawed certain provisions in existing contracts between the network and its component stations." Order No. 174-B, like the regulations in the *Columbia Broadcasting System* case, is also substantive and not merely procedural in nature since it fixes petitioners' rates or prices retroactively to June 7, 1954, and fixes the initial rates or prices which petitioners may charge for their gas and prevents them from collecting the price increases and tax reimbursements provided in their contracts without prior approval by the Commission, contrary to the opinion of this Court in *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U. S. 332, 339-343.

The material differences between the positions of Union Producing Company and petitioners make the opinion of the Court of Appeals and the action of this Court in that case inapplicable here and support the judicial review sought by petitioners of the orders in question. These differences should not be ignored by this Court as they have been by the Court of Appeals and by respondents.

Since this Court's decision in the *Phillips* case, the correct administration of the Natural Gas Act has become a matter of increased public importance because of the large number of producers now subject to the Act. The Commission in its attempt to regulate

sales made by these producers by the promulgation of the orders in question has, in petitioners' opinion, gone beyond its authority under the Natural Gas Act and violated the Administrative Procedure Act. Orderly administration of the Act will be expedited and an immense amount of litigation in the lower courts will be avoided by prompt judicial review of the validity of the orders in question and the legality of the provisions complained of by petitioners.

Respectfully submitted,

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May 23, 1956

CERTIFICATE OF SERVICE

I, Jesse P. Luton, Jr., counsel of record for Gulf Oil Corporation and Gulf Refining Company, petitioners herein, hereby certify that on the 22nd day of May, 1956, I served copies of the foregoing reply to brief for the respondents in opposition by mailing copies thereof in a duly addressed envelope with air mail postage prepaid to the attorneys for respondents as follows:

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